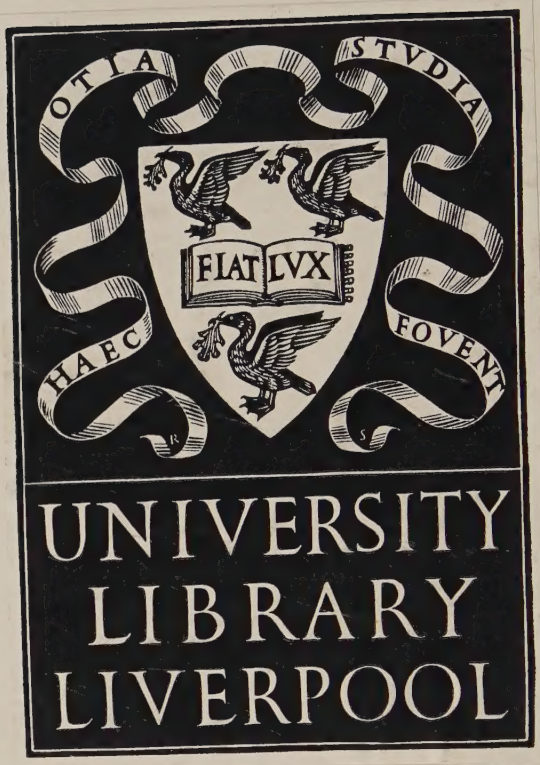
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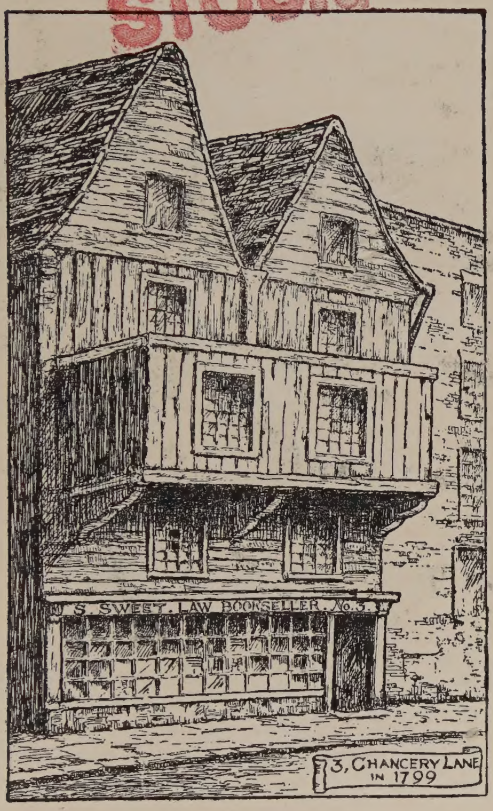


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# A DIGEST

OF THE

# LAW OF AGENCY

BY

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BY

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# PREFACE

THIS edition contains a number of alterations, the main features of which are set out below. In making these alterations I have been guided by the needs of practitioners and have, in the main, retained the style originally adopted by the author: the book therefore continues to contain a number of illustrations of principle following the main Articles.

I have added references to some ninety new cases, most of them recent, and have generally brought the book up to date. I have rearranged the Articles where such rearrangement appeared necessary: Agency of Necessity appears as Article 9 and Agency of Partners as Article 84.

A reconsideration of the cases decided during the last quarter of a century has led me to redraft certain Articles and to add, where appropriate, expositions of principle. After Article 65, the Remuneration of Agents, there is a discussion of the cases dealing with the payment of commission to estate agents and further discussions are added to Article 102, which deals with a principal's liability for the torts of his agent.

In previous editions small points of principle have been hidden amongst the large number of illustrations. I have endeavoured to extract all these and to set them out immediately following the appropriate Article.

The dicta of judges are no longer disregarded and references to them will be found throughout the book. In addition numerous references to the *American Restatement* and to important articles in the leading periodicals have been incorporated.

I am greatly indebted to Mr. Barry Chedlow who has by his advice and by reading the proofs given me much assistance.

Notes of cases decided since the text was sent to the printers are contained in an Appendix.

P. A.

*April*, 1951.

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# A DIGEST
## OF
# THE LAW OF AGENCY

## CHAPTER I

### PRELIMINARY

### Article 1

#### INTERPRETATION OF TERMS

In this book, unless a contrary intention appears from the context—

" Public agent " means an agent of the Crown or Government ;

" Agent " does not include public agent ;

" Home agent " means an agent residing and carrying on business as such in England or Wales ;

" Undisclosed principal " means a principal who is not known to be such by the person dealing with an agent ;

" Foreign principal " means a principal who does not reside or carry on business in England or Wales ;

" Third person " means any person other than the principal or agent ;

" Goods and chattels " includes all chattels personal ;

" Property " includes every description of property, whether real or personal.

### THE CLASSIFICATION OF AGENCY

### Article 2

#### DEFINITIONS

Agency is the relationship that exists between two persons one of whom, the principal, expressly or impliedly consents that the other, the agent, similarly consenting, should represent him or act

on his behalf. The relationship of principal and agent exists, and can only exist, by virtue of the express or implied assent of both principal and agent (*a*), except in certain cases of necessity in which the relationship is imposed by operation of law (*b*). The agent's privilege or right to act for the principal so as to affect his legal relations with third parties is known as his authority (*c*). This authority may be express or implied.

An agent may be either in the position of an independent contractor or a servant. The former is "one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand" (*d*). A servant is bound to act subject to the directions and the right of his principal to control him (*e*).

A general agent is an agent who has authority—

(a) to act for his principal in all matters, or in all matters concerning a particular trade or business, or of a particular nature ; or

(b) to do some act in the ordinary course of his trade, profession or business as an agent, on behalf of his principal ; *e.g.*, where a solicitor, factor or broker is employed as such (*f*).

A special agent is an agent who has only authority to do some particular act, or represent his principal in some particular transaction, such act or transaction not being in the ordinary course of his trade, profession, or business as an agent (*f*).

A factor is a mercantile agent whose ordinary course of business is to sell or dispose of goods, of which he is intrusted with the possession or control by his principal (*g*).

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(*a*) *Pole* v. *Leask* (1862), 33 L. J. Ch. 155 ; *Markwick* v. *Hardingham* (1880), 15 Ch. D. 339, 349, C. A. ; *Love* v. *Mack* (1905), 93 L. T. 352, C. A. See Article 3.

(*b*) See Article 4.

(*c*) See on this statement 17 C. B. R. 248 at p. 252.

(*d*) Pollock, Torts (14th ed.), pp. 64, 417. See *Honeywill and Stein Ltd.* v. *Larkin*, [1934] 1 K. B. 191 *per* Slesser L.J., at p. 196.

(*e*) *Quarman* v. *Burnett* (1840), 6 M. & W. 499 ; *Reedie* v. *L. & N. W. Ry.* (1849), 4 Ex. 244 ; *Hughes* v. *Percival* (1883), 8 App. Cas. 443 ; *Dalton* v. *Angus* (1881), 6 App. Cas. 740, H. L. ; *Jolliffe* v. *Woodhouse* (1894), 10 T. L. R. 553, C. A. ; *Lemaitre* v. *Davis* (1881), 19 Ch. D. 281 ; *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48, H. L. ; *Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392, C. A. ; *Hall* v. *Lees*, [1904] 2 K. B. 602, C. A. ; *Smith* v. *General Motor Cab Co., Ltd.*, [1911] A. C. 118 ; 80 L. J. K. B. 839, H. L. ; *Hurlstone* v. *London Electric Ry.* (1914), 30 T. L. R. 398, C. A. ; and see *Performing Right Society, Ltd.* v. *Mitchell, &c., Ltd.*, [1924] 1 K. B. 762 ; 93 L. J. K. B. 306, in which McCardie, J., reviewed the tests. The right to control is the test put forward in the American Restatement of the Law of Agency, see §§ 1, 2.

(*f*) See *Smith* v. *M'Guire* (1858), 3 H. & N. 554 ; 27 L. J. Ex. 465 ; *Brady* v. *Todd* (1861), 9 C. B. (N.S.) 592 ; 30 L. J. C. P. 223 ; *Barrett* v. *Irvine*, [1907] 2 Ir. R. 462, C. A. The distinction between general and special agents is only of importance in determining the nature and extent of the authority conferred. See Articles 35 to 38.

(*g*) *Baring* v. *Corrie* (1818), 2 B. & A. 137 ; *Stevens* v. *Biller* (1883), 25 Ch. D. 31 ; 53 L. J. Ch. 249, C. A.

A mercantile agent, within the meaning and for the purposes of the Factors Act, 1889 (*h*), is an agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods (*i*).

A broker is an agent whose ordinary course of business is to negotiate and make contracts for the sale and purchase of goods and other property, of which he is not intrusted with the possession or control (*k*).

An auctioneer is an agent whose ordinary course of business is to sell by public auction goods or other property, of which he may or may not be intrusted with the possession or control.

A *del credere* agent is a mercantile agent who, in consideration of extra remuneration, called a *del credere* commission, guarantees to his principal that third persons with whom he enters into contracts on behalf of the principal shall duly pay any sums becoming due under those contracts (*i*).

The American Restatement of the Law of Agency (throughout this volume referred to as the American Restatement) contains definitions that should be noted ; at § 1 agency is defined as " the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act ". At § 7 authority is defined as " the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him ".

Whether a person can act as an agent in any particular case will depend upon the facts of that case, for example, although a manager, in the position of a ship's captain may have control over persons on board the ship, they are not necessarily his agents for all purposes in the absence of evidence of delegation of duties to them (*l*).

In effect, a *del credere* agent is a surety for the persons with whom he deals (*i*). But an agreement by an agent to sell on a *del credere* commission is not a promise to answer for the debt, default, or miscarriage of another person, within the meaning of the fourth section of the Statute of Frauds (*m*),

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(*h*) 52 & 53 Vict. c. 45, s. 1. A servant or shopman is not a mercantile agent : *Lowther* v. *Harris*, [1927] 1 K. B. 393 ; 96 L. J. K. B. 170 ; *Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354 ; 44 L. J. C. P. 233 ; *Lamb* v. *Attenborough* (1862), 1 B. & S. 131 ; 31 L. J. Q. B. 41 ; *Heyman* v. *Flewker* (1863), 13 C. B. (N.S.) 519 ; 32 L. J. C. P. 132 ; but a person may be employed as a mercantile agent although he has no general occupation as agent and is acting for one principal only, or in an isolated transaction : *Lowther* v. *Harris, supra ; Weiner* v. *Harris*, [1910] 1 K. B. 285 ; 79 L. J. K. B. 342. See also *Turner* v. *Sampson* (1911), 27 T. L. R. 200 ; *Heap* v. *Motorists' Advisory Agency*, [1923] 1 K. B. 577 ; 92 L. J. K. B. 553 ; *Budberg* v. *Jerwood* (1934), 78 S. J. 878 ; Article 88.

(*i*) *Morris* v. *Cleasby* (1816), 4 M. & S. 566 ; *Hornby* v. *Lacy* (1817), 6 M. & S. 166 ; *Grove* v. *Dubois* (1786), 1 T. R. 112.

(*k*) See note (*g*), previous page, and *Fowler* v. *Hollins* (1872), L. R. 7 Q. B. 616, 623.

(*l*) *Hobson* v. *Bartram & Sons*, [1950] 1 All E. R. 412, C. A.

(*m*) 29 Car. 2, c. 3.

and it is not necessary that such an agreement should be in writing (*n*). A *del credere* agency may be inferred from a course of conduct between the parties (*o*).

The principal is not entitled to litigate with a *del credere* agent any disputes arising out of contracts made by him, nor is such an agent responsible to the buyer for the due performance of the principal's contract (*p*). The obligation of the agent is confined to answering for the failure by the other contracting parties, owing to insolvency or the like, to pay any ascertained sums which may become due from them as debts (*q*).

*Distinction between del credere agent and purchaser.*—Where goods were consigned by A to B for the purpose of sale, and it was agreed that B should have the right to sell at such prices and on such terms as he thought fit, and should pay an agreed price for the goods sold by him within a fixed period after the sale, it was held that the relation between A and B was that of buyer and seller, not that of principal and agent (*r*). But the mere fact that a person employed to sell goods is allowed by way of remuneration all the profit obtained by him over and above an agreed price, and that he guarantees the payment of that agreed price to the person employing him, does not prevent the relation between them being that of principal and agent, if it appear from the circumstances that their intention was to establish a *del credere* agency (*s*).

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(*n*) *Couturier* v. *Hastie* (1852), 22 L. J. Ex. 97 ; 8 Ex. 40 ; *Wickham* v. *Wickham* (1855), 2 Kay & J. 487 ; *Sutton* v. *Grey*, [1894] 1 Q. B. 285 ; 63 L. J. Q. B. 633, C. A.

(*o*) *Shaw* v. *Woodcock* (1827), 7 B. & C. 73, but see *Montague Stanley & Co.* v. *Solomon*, [1932] 2 K. B. 287.

(*p*) *Churchill & Sim* v. *Goddard*, [1937] 1 K. B. 92.

(*q*) *Gabriel* v. *Churchill*, [1914] 3 K. B. 1272 ; 84 L. J. K. B. 733, C. A. Cf. *Nouvelles Huileries Anversoises* v. *Mann* (1924), 40 T. L. R. 804.

(*r*) *Ex p. White, re Nevill* (1870), 40 L. J. Bk. 73 ; L. R. 6 Ch. 397. See also *Towle* v. *White* (1873), 29 L. T. 78, H. L. ; *Livingstone* v. *Ross*, [1901] A. C. 327 ; 70 L. J. P. C. 58, P. C. ; *Michelin Tyre Co.* v. *Macfarlane* (1917), 55 Sc. L. R. 35, H. L. ; *Lamb* v. *Goring Brick Co.*, [1932] 1 K. B. 710 ; 101 L. J. K. B. 214.

(*s*) *Ex p. Bright, re Smith* (1879), 48 L. J. Bk. 81 ; 10 Ch. D. 566, C. A. See also *Weiner* v. *Harris*, [1910] 1 K. B. 285 ; 79 L. J. K. B. 342, C. A.

# CHAPTER II

## CREATION OF AN AGENCY

SECT. 1.—*Constitution of the Relationship of Principal and Agent*

### Article 3

CREATION OF RELATIONSHIP OF PRINCIPAL AND AGENT, GENERAL

WHERE there is an express contract of agency either in writing or by word of mouth this will be the constitution of the relationship of principal and agent and the consent of both parties to the creation of the relationship will be contained therein.

The assent of the principal is implied whenever another person occupies such a position that, according to ordinary usage, he would be understood to have the principal's authority to act on his behalf (*t*).

The assent of the agent is implied whenever he acts or purports to act on behalf of another person ; and after having so acted or purported to act he is not permitted, in an action by such person, to deny that the agency in fact existed, or that he acted on such person's behalf (*u*).

The relationship of principal and agent may be constituted—

(a) by express appointment by the principal (*a*), or by a person duly authorised by the principal to make such appointment (*b*) ;

(b) by implication of law from the conduct or situation of the parties (*c*), or from the necessity of the case (*d*) ; or

(c) by subsequent ratification by the principal of acts done on his behalf (*e*).

Where a person assumes to act on behalf of another, the assent of the person on whose behalf the act is done will not be implied from his mere silence or acquiescence, unless the situation of the parties is such as to raise a presumption that the act is done by his authority (*f*).

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(*t*) See the judgment in *Pole* v. *Leask* (1862), 33 L. J. Ch. 155, H. L. Illustrations 1 to 10 ; Article 82, Illustration 11.

(*u*) *Roberts* v. *Ogilby* (1821), 9 Price 269 ; *Moore* v. *Peachey* (1891), 7 T. L. R. 748.

(*a*) See Article 22.

(*b*) Illustrations 1 and 3 ; Article 42.

(*c*) Illustrations 3 to 9. See also Articles 11 *et seq.*, as to the implied agency of married women, etc., and pp. 65 to 68 as to implied agency of shipmasters.

(*d*) Article 4.

(*e*) See Articles 25 *et seq.*

(*f*) Illustrations 9 and 10.

*The Implied Authority of Auctioneers.*—An auctioneer is by implication an agent of the purchaser for the purpose of signing the contract of sale on his behalf, so as to satisfy the requirements of s. 40 of the Law of Property Act, 1925 (*g*), or of s. 4 of the Sale of Goods Act, 1893 (*h*), s. 4, it being understood that the auctioneer has authority in the ordinary course of business to sign the contract on behalf of the highest bidder (*i*). This implied authority to sign can only be exercised at the time of the sale, *i.e.*, while the bidder is in the auction room, or so long afterwards as the signature can reasonably be held to form part of the contract, *e.g.*, a week is too long, but later the same day is not (*k*). But the authority does not extend to the auctioneer's clerk, and a purchaser is not bound by the signature of the clerk, unless he indicates that he assents to the clerk's signing for him (*k*).

If after an auction sale, a purchaser buys certain unsold lots by private contract with the auctioneer, the auctioneer has no implied authority to sign the contract on the purchaser's behalf (*l*). An authority to sign separate contracts for several lots is not an authority to sign one contract for all the lots (*m*).

*Illustrations*

1. A receiver appointed by a mortgagee in pursuance of the implied power conferred by the Law of Property Act, 1925, s. 109, is, in the performance of his duties as receiver, an agent of the mortgagor, and if appointed after the death of the mortgagor, is an agent of his legal personal representatives to the extent of the assets (*n*). But, if the receiver refuse to account to the mortgagee for moneys coming to his hands, the mortgagee can bring an action against him for an account (*o*).

2. A mortgagor in possession is an implied agent of the mortgagee to distrain for rent due under a lease granted prior to the mortgage (*p*). But a pledgee of an insurance policy has no implied authority, as such, to give, on behalf of the pledgor, a notice of abandonment to the underwriters (*q*).

3. By a trust deed securing debentures, the property of a company was transferred to trustees upon trust to permit the company to carry on the business until the happening of certain events upon which the trustees were empowered to appoint a receiver, and it was provided that any receiver so appointed should be the agent of the company, which alone should be liable

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(*g*) 15 Geo. 5, c. 20.
(*h*) 56 & 57 Vict. c. 71.
(*i*) *Emmerson* v. *Heelis* (1809), 2 Taunt. 38 ; *White* v. *Proctor* (1811), 4 Taunt. 209. But the auctioneer has no authority to sign a contract bearing a wrong date : *Van Praagh* v. *Everidge*, [1903] 1 Ch. 434 ; 72 L. J. Ch. 260, C. A.
(*k*) *Bell* v. *Balls*, [1897] 1 Ch. 663 ; 66 L. J. Ch. 397 : see also *Chaney* v. *Maclow*, [1929] 1 Ch. 461 ; 98 L. J. Ch. 345, C. A.
(*l*) *Mews* v. *Carr* (1856), 1 H. & N. 484.
(*m*) *Smith* v. *MacGowan*, [1894] 2 Ch. 318 ; 63 L. J. Ch. 535 ; *Bird* v. *Boulter* (1833), 1 N. & M. 313 ; 38 R. & R. 285.
(*n*) 15 Geo. 5, c. 20 ; *Re Hale, Lilley* v. *Foad*, [1899] 2 Ch. 107 ; 68 L. J. Ch. 517, C. A.
(*o*) *Leicester Permanent Building Society* v. *Butt*, [1943] Ch. 308 ; 112 L. J. Ch. 289.
(*p*) *Trent* v. *Hunt* (1853), 9 Ex. 14 ; 22 L. J. Ex. 318 ; *Snell* v. *Finch* (1863), 32 L. J. C. P. 117 ; 13 C. B. (N.S.) 651.
(*q*) *Jardine* v. *Leathley* (1863), 32 L. J. Q. B. 132 ; 3 B. & S. 700.

for his acts and defaults. It was held that a receiver so appointed, who entered into possession and carried on the business of the company, was not an agent of the trustees, and that they were not liable for the price of goods supplied for the purposes of the business (*r*). But where power was given by debentures to the holders to appoint a receiver to take possession of the property charged and carry on the business of the company, and to sell the property charged and make any arrangements or compromise in the interests of the debenture holders, and it was not provided that the receiver should be an agent of the company, it was held that a receiver appointed in pursuance of the power was an agent of the debenture holders and not of the company (*s*). So, a receiver and manager of the business of a company appointed by the Court at the instance of debenture holders is not an agent of the company (*t*).

4. A debtor executes a deed whereby A and B are appointed inspectors, with power to control him in carrying on a business, and to receive moneys and pay current expenses, etc., but not to take the management of the business out of his hands. The debtor is not an agent of A and B to carry on the business, but a principal carrying on his own business subject to their inspection and control (*u*).

5. A debtor, by deed, assigns his business and effects to A and B as trustees to continue the business in his name, for the benefit of his creditors, and, in accordance with the provisions of the deed, the debtor is employed by A and B to carry on the business. The debtor is an agent of A and B for the purpose of carrying on the business, and they are liable on contracts made by him in the ordinary course thereof in his own name (*a*). The debtor is not, nor are A and B, the agent of the creditors in carrying on the business (*b*).

6. A buys property at a sale by auction, and, at the request of the auctioneer's clerk, who is acting under the directions of the auctioneer, gives his name and address as purchaser, and stands by while the clerk fills in the name and address in a memorandum of the sale. The memorandum is signed by a duly authorised agent of A within the meaning of the Law of Property Act, 1925 (*c*), s. 40, the conduct of A being such as to show that he assented to the clerk's signing his name on his behalf (*d*).

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(*r*) *Gosling* v. *Gaskell*, [1897] A. C. 575 ; 66 L. J. Q. B. 848, H. L.

(*s*) *Re Vimbos*, [1900] 1 Ch. 470 ; 69 L. J. Ch. 209 ; *Deyes* v. *Wood*, [1911] 1 K. B. 806 ; 80 L. J. K. B. 553, C. A.

(*t*) *Burt* v. *Bull*, [1895] 1 Q. B. 276 ; 64 L. J. Q. B. 232, C. A. ; and see *Boehm* v. *Goodall* (1910), 27 T. L. R. 106. A person authorised under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 116 and 120, to carry on the business of a lunatic not so found, is in the position of an agent of the lunatic for that purpose : *Plumpton* v. *Burkinshaw*, [1908] 2 K. B. 572 ; 77 L. J. K. B. 961, C. A.

(*u*) *Redpath* v. *Wigg* (1866), 35 L. J. Ex. 311 ; L. R. 1 Ex. 335, Ex. Ch. ; *Easterbrook* v. *Barker* (1870), 40 L. J. C. P. 17 ; L. R. 6 C. P. 1 ; *Hobson* v. *Jones* (1870), 39 L. J. Ch. 245 ; L. R. 9 Eq. 456 ; *Marconi's Wireless Telegraph Co.* v. *Newman*, [1930] 2 K. B. 292 ; 99 L. J. K. B. 687.

(*a*) *Furze* v. *Sharwood* (1841), 2 Q. B. 388. Comp. *Nicholls* v. *Knapman* (1910), 102 L. T. 306, C. A.

(*b*) *Cox* v. *Hickman* (1861), 30 L. J. C. P. 125 ; 9 H. L. Cas. 268, H. L.

(*c*) 15 Geo. 5, c. 20.

(*d*) *Sims* v. *Landray*, [1894] 2 Ch. 318 ; 63 L. J. Ch. 535 ; *Bird* v. *Boulter* (1833), 1 N. & M. 313 ; 38 R. R. 285.

7. A bought goods at a sale by auction, the vendor having previously agreed with him that the price of any goods he might buy should be set off against a debt. Held, that the auctioneer, though not aware of the previous agreement with the vendor, had no authority to sign on A's behalf a contract subject to a condition providing for payment in cash (*e*).

8. Property is sold under a decree. The solicitor having the management of the sale is, in the conduct thereof, deemed to be the agent of all the parties to the suit, as between them and the purchaser (*f*).

9. The promoters of a company are not, as such, implied agents to pledge the credit, or receive money on behalf, of each other, in connection with the promotion of the company. Nor are the officers of a proposed company, as such, implied agents of the promoters (*g*).

10. A called at B's office and verbally agreed to be responsible for the price of certain goods to be supplied by B to a third person. B's clerk, in A's presence, made and signed a memorandum of the agreement. Held, that the clerk had no implied authority to sign as A's agent, and that there was not a sufficient memorandum in writing of the agreement to satisfy section 4 of the Statute of Frauds (*h*).

11. A's traveller sold goods to B, and in B's presence wrote out two memoranda of the sale ; put B's name upon them ; handed one to B ; and retained the other. Held, that he had no implied authority to sign a memorandum of the contract as B's agent (*i*). Otherwise, if B had by his conduct shown an intention to constitute the traveller his agent for the purpose of making a record of the contract on his behalf (*k*).

## Article 4

### AGENCY OF NECESSITY

An authority of necessity is conferred by law in certain cases where a person is faced with an emergency in which the property or interests of another are in imminent jeopardy and it becomes necessary in order to preserve the property or interests, to act before the owner's instructions can be obtained. The law assumes the consent of the owner to the creation of the relationship of principal and agent.

The doctrine of agency of necessity was considered (*l*) until recently to apply to two classes of persons : (1) those who accepted bills of exchange

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(*e*) *Bartlett* v. *Purnell* (1836), 5 L. J. K. B. 169 ; 4 A. & E. 792.
(*f*) *Dalby* v. *Pullen* (1830), 1 Russ. & M. 296.
(*g*) See Article 5, Illustration 3 ; *Burnside* v. *Dayrell* (1849), 3 Ex. 224 ; 19 L. J. Ex. 46.
(*h*) 29 Car. 2, c. 3 ; *Dixon* v. *Broomfield* (1814), 2 Chit. 205.
(*i*) *Murphy* v. *Boese* (1875), 44 L. J. Ex. 40 ; L. R. 10 Ex. 126 ; *Graham* v. *Musson* (1839), 8 L. J. C. P. 324 ; 7 Scott 769 ; *Graham* v. *Fretwell* (1841), 3 M. & G. 368.
(*k*) *Durrell* v. *Evans* (1862), 31 L. J. Ex. 337 ; 1 H. & C. 174, Ex. Ch.
(*l*) *Gwilliam* v. *Twist*, [1895] 2 Q. B. 84 ; 64 L. J. Q. B. 74.

for the honour of the payee (*m*), and (2) masters of ships whose authority arises from the emergencies of the voyage (*n*). But it may be applied to carriers by land provided that a real necessity exists and it has become commercially impossible or extraordinarily difficult for the carrier to communicate with the owner of the goods. The principle has, however, been confined to cases where the goods were perishable (*o*) or in a similar category, *e.g.*, livestock (*p*). "The Courts should be slow to increase the classes of those who can be looked upon as agents of necessity in selling or disposing of other people's goods without the authority of the owners" (*q*).

It has been held that, where, under a contract of sale to a buyer in a foreign country, goods were exported, which were not in accordance with the contract, and the buyer could not, acting reasonably or consistently with the interests of the seller, return them, the buyer might act as agent for the seller in selling the goods (*r*); and that sellers of goods to a buyer abroad, to whom, owing to war conditions, they could not deliver, and with whom they were unable to communicate, might re-sell as the original buyer's agents of necessity (*s*); but the latter decision has been strongly criticised and it seems doubtful whether an agency of necessity would arise in either case (*t*).

S stored furniture in a room belonging to M without charge, he then did not visit M nor inform him of his changes of address. M wishing to let the premises, tried to get in touch with S by telephone and letter, but failed, as his whereabouts were unknown and there was nothing to show that he received the letters. M then sent the furniture for sale by auction; it was held in an action by the owner for conversion that M was not an agent of necessity and that he was guilty of conversion (*u*). Similarly where a car was left in a yard and became, to some degree, a nuisance, it was held that no real emergency arose permitting the owner of the yard to send the car to an auction after he had been unable to get in touch with the owner (*x*).

It has been held that no lien arises in favour of a stranger who succours a stray animal (*y*) or conveys timber found on the bank of a river to a place of safety (*a*), and probably no money claim arises in either case. A wife deserted by her husband may pledge his credit as agent of necessity (*b*).

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(*m*) See note (*l*) and Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 64.
(*n*) See pp. 65 to 68.
(*o*) *Sims* v. *Midland Ry.*, [1913] 1 K. B. 103; 82 L. J. K. B. 67; *Springer* v. *G. W. Ry.*, [1921] 1 K. B. 257; 89 L. J. K. B. 1010.
(*p*) *G. N. Ry.* v. *Swaffield* (1874), 43 L. J. Ex. 69; L. R. 9 Ex. 132.
(*q*) *Per* Lord Goddard C.J., *Sachs* v. *Miklos*, [1948] 2 K. B. 23 at 26; [1948] L. J. R. 1012; 64 T. L. R. 181; [1948] 1 All E. R. 67; approving *Jebara* v. *Ottoman Bank*, [1927] 2 K. B. 254; 96 L. J. K. B. 451, *per* Scrutton L.J. But the decision in the former case was on the ground that no emergency had arisen and not on the ground, stated in the latter, that there could be no agency of necessity with a pre-existing agency. See also *Munro* v. *Willmott*, [1949] 1 K. B. 295.
(*r*) *Kemp* v. *Pryor* (1812), 7 Ves. 237.
(*s*) *Prager* v. *Blatspiel*, [1924] 1 K. B. 566; 93 L. J. K. B. 410.
(*t*) See *Jebara* v. *Ottoman Bank*, *supra*; *Gwilliam* v. *Twist*, *supra*; *Hawtayne* v. *Bourne* (1841), 7 M. & W. 595.
(*u*) *Sachs* v. *Miklos*, *supra*.
(*x*) *Munro* v. *Willmott*, [1948] 2 All E. R. 983.
(*y*) *Binstead* v. *Buck* (1776), 2 Wm. Bl. 1117.
(*a*) *Nicholson* v. *Chapman* (1793), 2 Hy. Bl. 254.
(*b*) See Article 16.

## Article 5

AGENCY BY ESTOPPEL : HOLDING OUT

Where any person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to any one dealing with him as an agent on the faith of such representation (*c*), to the same extent as if such other person had the authority which he was so represented to have (*d*).

Where a third party has written notice from the principal of the extent of the agent's authority, it requires a strong case to establish an ostensible authority beyond the actual authority so notified (*e*).

*Promoters of companies.*—Where a promoter of a company has taken an active part in the promotion, it is a question of fact whether he thereby has held himself out as having authorised his credit to be pledged for expenses connected therewith, and if so, whether the expenses were incurred on the faith of such holding out (*f*). But the mere fact that a person is a promoter is not, of itself, evidence of his having authorised, or held himself out as having authorised, his credit to be pledged (*g*).

*Club committees.*—The management committee of an unincorporated members' club exercise the members' powers as agents for the members ; it does not contract as a separate body with individual members so, *e.g.*, does not warrant the safety of the club's premises (*h*).

Neither the committee of management nor servants of a club are, as such, deemed to be held out by the members of the club as having authority to pledge the personal credit of the members (*i*). But the members of a committee may be liable for the acts of a servant whom they have appointed (*k*). The only persons liable for goods supplied to a members' club are those by whom,

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(*c*) See Illustration 17.

(*d*) See Illustrations. *Brazier* v. *Camp* (1894), 63 L. J. Q. B. 257, C. A. ; *King* v. *Smith*, [1900] 2 Ch. 425 ; 69 L. J. Ch. 598 ; *Union Credit Bank* v. *Mersey Docks, etc., Board*, [1899] 2 Q. B. 205 ; 68 L. J. Q. B. 842 ; *Little* v. *Spreadbury*, [1910] 2 K. B. 658 ; 79 L. J. K. B. 1119. This is an instance of the principle of estoppel *in pais* : see *Pole* v. *Leask* (1862), 33 L. J. Ch. 155. As to holding out by corporations, see Article 24.

(*e*) *Australian Bank of Commerce* v. *Perel*, [1926] A. C. 737 ; 95 L. J. P. C. 585, P. C.

(*f*) *Lake* v. *Argyll* (1844), 6 Q. B. 477 ; 14 L. J. Q. B. 73 ; *Wood* v. *Argyll* (1844), 13 L. J. C. P. 96 ; 6 M. & G. 928 ; *Bailey* v. *Macauley* (1849), 13 Q. B. 815 ; 19 L. J. Q. B. 73 ; *Williams* v. *Pigott* (1848), 2 Ex. 201 ; 17 L. J. Ex. 196 ; *Bright* v. *Hutton* (1852), 3 H. L. C. 341 ; *Higgins* v. *Hopkins* (1848), 3 Ex. 163 ; 18 L. J. Ex. 113.

(*g*) *Norris* v. *Cottle* (1850), 2 H. L. C. 647 ; *Bright* v. *Hutton, supra* ; *Hutton* v. *Thompson* (1851), 3 H. L. C. 161 ; *Burbidge* v. *Morris* (1865), 34 L. J. Ex. 131 ; 3 H. & C. 664 ; *Wyld* v. *Hopkins* (1846), 15 M. & W. 517 ; 71 R. R. 751 ; *Barker* v. *Stead* (1847), 3 C. B. 946 ; *Bailey* v. *Macauley, supra* ; *Williams* v. *Pigott, supra.*

(*h*) *Shore* v. *Ministry of Works*, [1950] 2 All E. R. 228, C. A.

(*i*) *Flemyng* v. *Hector* (1836), 6 L. J. Ex. 43 ; 2 M. & W. 172. Illustration 15. *Wise* v. *Perpetual Trustee Co.*, [1903] A. C. 139 ; 72 L. J. P. C. 31, P. C. Comp. *Cockerell* v. *Aucompte* (1857), 26 L. J. C. P. 194 ; 2 C. B. (N.S.) 440 ; *Luckombe* v. *Ashton* (1862), 2 F. & F. 705.

(*k*) Illustration 16. See also *Prole* v. *Allen*, [1950] 1 All E. R. 476.

or by whose authority, the goods are ordered, and the mere fact that a person is a member of the managing committee is not of itself evidence of authority to pledge his credit (*l*).

*Illustrations*

1. The owner of certain goods permits A, who in the ordinary course of his business is accustomed to sell that class of goods, to have possession of the goods or of the documents of title thereto. A sells the goods to a person who buys them in the belief that he has authority to sell. The owner is bound by the sale, independently of the Factors Act, though he did not, in fact, authorise A to sell the goods (*m*).

2. A and B permitted their names to appear on a programme as stewards of a fete, C's name appearing thereon as general manager. A and B took an active part in the conduct of the fete. Held, that they were liable on orders given by C for tents, etc. (*n*).

3. At a meeting of the provisional directors of a proposed company it was resolved that the company should be advertised, and the secretary was directed to take the necessary steps for that purpose. The secretary employed an advertising agent and upon being asked on what authority he was acting, showed the agent the prospectus and resolution. Held, that the jury were justified in finding the directors who were parties to the resolution liable for the expenses of the advertising agent, on the ground that they had held out the secretary as having authority to pledge their credit therefor, though they had allowed their names to appear as provisional directors on the faith of a promise by the secretary to find all the preliminary expenses (*o*).

4. A charterparty provides that the master, who is appointed by the owners, shall sign bills of lading as the agent of the charterers only. The owners are liable on a bill of lading signed by the master, to a person who ships goods without notice of the charterparty (*p*). So, the owners are liable in such case for necessaries supplied on the master's orders by persons having no notice of the charterparty (*q*).

5. A had for some years managed a shop belonging to B and ordered goods in B's name from C, and B had duly paid for them. A absconded, called on C and bought goods in B's name, and took them away. Held, that B was liable for the price of the goods (*r*).

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(*l*) *Overton* v. *Hewett* (1387), 3 T. L. R. 246 ; *Steele* v. *Gourley* (1887), 3 T. L. R. 772, C. A. ; *Wood* v. *Finch* (1861), 2 F. & F. 447 ; *Draper* v. *Manvers* (1892), 9 T. L. R. 73. See also *Lascelles* v. *Rathbun* (1919), 35 T. L. R. 347 (Commanding Officer not liable for price of goods ordered by mess secretary).

(*m*) *Pickering* v. *Busk* (1812), 15 East 38 ; *Dyer* v. *Pearson* (1824), 4 D. & R. 648 ; *Henderson* v. *Williams*, [1895] 1 Q. B. 521 ; 64 L. J. Q. B. 308, C. A.

(*n*) *Pilot* v. *Craze* (1888), 52 J. P. 311.

(*o*) *Maddick* v. *Marshall* (1864), 17 C. B. (N.S.) 829, Ex. Ch. ; *Riley* v. *Packington* (1867), L. R. 2 C. P. 536 ; 36 L. J. C. P. 204 ; *Pearson's Exors.' Case* (1852), 3 De G. M. & G. 241.

(*p*) *Manchester Trust* v. *Furness*, [1895] 2 Q. B. 539 ; 64 L. J. Q. B. 766, C. A. ; *Sandeman* v. *Scurr* (1866), L. R. 2 Q. B. 86 ; 36 L. J. Q. B. 58. Comp. *Baumwoll Manufactur* v. *Furness*, [1893] A. C. 8 ; 62 L. J. Q. B. 201, H. L.

(*q*) *The Great Eastern* (1868), L. R. 2 Ad. 88 ; *Frost* v. *Oliver* (1853), 1 C. L. R. 1003 ; 22 L. J. Q. B. 353.

(*r*) *Summers* v. *Solomon* (1857), 26 L. J. Q. B. 301.

6. A coachman in livery entered into a contract for the hire of horses, the person from whom he hired them giving credit to the master. The coachman had, in fact, agreed with the master to pay for the hire of the horses, but the person from whom they were hired had no notice of the agreement. Held, that the master was liable on the contract (*s*).

7. A wife gave orders for furniture to be supplied and work to be done at the house where she resided with her husband, the husband being present giving directions as to the work, etc. Held, that the husband was liable on the orders, although he had expressly forbidden his wife to pledge his credit, and it had been agreed between them that she should pay for the furniture and work, the plaintiff having had no notice of such prohibition or agreement (*t*). So, where a wife ordered goods in her husband's name, to be sent to the house of a third person, and the husband paid for the goods, it was held that there was evidence upon which a jury might find that she had authority to pledge his credit on a subsequent occasion for goods to be sent to the same house (*u*).

8. A occasionally employed B to purchase goods from C and duly recognised such purchases. Subsequently, B purchased goods from C for his own use, C believing him to be buying them on behalf of A, and giving credit to A. Held, that it was a question of fact whether A had, by his conduct, held out B as his agent to purchase the goods (*a*).

9. A, a stockbroker, employed B, a clerk, to whom he allowed a commission on orders obtained by him and accepted by A. B was not authorised to accept orders on A's behalf. On three occasions C gave orders to B, which were passed on to A, and executed by him, A sending contract notes to C. C made payment in respect of the first two orders by cheques payable to A's order, and in respect of the third order by a cheque payable to B's order. The cheques were delivered to B, and passed on to A, who duly credited C. Subsequently, C gave orders to B, who did not transmit them to A, but made out bought notes on which he forged A's signature, and handed them to C. C gave cheques in payment to B, who misapplied them. It was held that there was no evidence that A had held out B as authorised to accept orders on his behalf, and that A was under no liability in respect of the orders subsequent to the first three (*b*).

10. A represented to a company that B was an applicant for a certain number of shares, and the company allotted them to B. Subsequently, B, at A's request, signed an application for the shares and sent it to A, who received the letter of allotment, and paid the allotment money. B never received any notice of the allotment, and the dividends on the shares were paid to A. Held, that B had held out A as his agent to accept the shares on

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(*s*) *Rimell* v. *Sampayo* (1824), 1 C. & P. 254 ; *Precious* v. *Abel* (1795), 1 Esp. 350. Comp. *Maunder* v. *Conyers* (1817), 2 Stark. 281 ; *Wright* v. *Glyn*, [1902] 1 K. B. 745 ; 71 L. J. K. B. 497, C. A.

(*t*) *Jetley* v. *Hill* (1884), 1 C. & E. 239.

(*u*) *Filmer* v. *Lynn* (1835), 4 N. & M. 559.

(*a*) *Todd* v. *Robinson* (1825), 1 Ry. & M. 217 ; *Gilman* v. *Robinson* (1825), 1 Ry. & M. 226 ; *Trueman* v. *Loder* (1840), 11 A. & E. 589 ; *Llewellyn* v. *Winckworth* (1845), 14 L. J. Ex. 329 ; 13 M. & W. 598 ; *Prescott* v. *Flynn* (1832), 1 L. J. C. P. 145 ; 9 Bing. 19. Comp. *Barrett* v. *Ervine*, [1907] 2 Ir. R. 462, C. A.

(*b*) *Spooner* v. *Browning*, [1898] 1 Q. B. 528 ; 67 L. J. Q. B. 393, C. A.

his behalf, and was therefore liable as a contributory in the winding-up of the company (*c*).

11. A signs an underwriting agreement purporting to give B authority to apply for shares in a company in A's name and on his behalf, and hands it to an agent of the promoters, with a letter stating that the agreement was signed, and is only to hold good, on certain conditions. The agreement is delivered to B, who applies for the shares, and they are duly allotted to A, neither B nor the company having any notice of the letter or conditions. A is bound as a shareholder, though the conditions were not complied with (*d*).

12. A was in B's counting-house, apparently intrusted with the conduct of B's business. Held, that a payment to A on B's account operated as a payment to B, although A was not, in fact, employed by B (*e*).

13. A, in good faith, deals with persons acting as directors of a company, believing them to be duly authorised. The company is bound by their acts as directors, within the scope of the articles of association, though they have not, in fact, been properly appointed (*f*).

14. The directors of a company hold out A as the agent of the company for a particular purpose. The company is bound by A's acts, within the scope of such countenanced agency, done to the knowledge of the directors, though A is not a duly appointed agent of the company (*g*).

15. A member of the managing committee of a club orders wine for the club, the committee having no authority to deal on credit. The other members of the committee are not liable for the price of the wine, unless they authorised the contract (*h*).

16. An unincorporated society had among its objects the investigating and advising upon diseases affecting poultry. Its affairs were managed by a council, who appointed A as manager and B as tester. All the members of the council either voted for, or knew and approved of, A's and B's appointments. The plaintiffs were invited, by letters and circulars, sent on the note-paper, and from the office, of the society, by A, to have a test made of their poultry. The test was made by B, and it was found that the test was negligently carried out and that the plaintiffs' poultry became infected as the result of such negligence. Held, that A had contracted for, and B had carried out, the test as agents for all the members of the council, who were liable for the damage caused by B's negligence (*i*).

17. A, the tenant and licensee of a public house, agreed with B and the owners of the public house that B should become tenant in place of A, but the licence was not transferred to B and A's name remained painted over the doorway. C, not knowing that A was the licensee, supplied goods at the public house to B ; and afterwards discovered that A was the licensee and sued him for the price of the goods. Held, that the agreement that B should

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(*c*) *Levita's Case* (1870), L. R. 5 Ch. 489 ; 39 L. J. Ch. 673.
(*d*) *Ex p. Harrison, re Bentley* (1893), 69 L. T. 204, C. A.
(*e*) *Barrett* v. *Deere* (1828), Moo. & M. 200 ; 31 R. R. 730.
(*f*) *Mahony* v. *East Holyford Mining Co.* (1875), L. R. 7 H. L. 869 ; *Re County Life Ass. Co.* (1870), L. R. 5 Ch. 288 ; 39 L. J. Ch. 471.
(*g*) *Wilson* v. *West Hartlepool Harbour, etc., Co.* (1864), 34 Beav. 187. See also Article 81, Illustrations 15 and 16.
(*h*) *Todd* v. *Emly* (1841), 7 M. & W. 427 ; 56 R. R. 748.
(*i*) *Bradley Egg Farm, Ltd.* v. *Clifford*, [1943] 2 All E. R. 378, C. A.

occupy a position as tenant which could only be lawfully occupied by A, did not make B the agent of A in relation to C ; and that there was no estoppel in the matter between A and C, because, whatever misrepresentations had been made, they had not reached C nor caused him to act to his detriment (*k*).

## Article 6

### CAPACITY TO ACT AS PRINCIPAL

Capacity to contract or do any other act by means of an agent is co-extensive with the capacity of the principal himself to make the contract or do the act which the agent is authorised to make or do. Provided that, where capacity to do a particular act exists only by virtue of a special custom, the act cannot be done by means of an agent unless the custom warrant its being so done (*l*).

An infant or lunatic is bound by a contract made by his agent with his authority, where the circumstances are such that he would have been bound if he had himself made the contract (*m*). On the other hand, a corporation or incorporated company has no capacity to appoint an agent for any purpose, or to do any act, beyond the scope of its charter or memorandum of association (*n*).

By the Law of Property Act, 1925, s. 129, a married woman, whether an infant or not, has power, as if she were unmarried and of full age, by deed to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do (*o*) ; and by the Law Reform (Married Women and Tortfeasors) Act, 1935 (*p*), s. 1, a married woman is capable of disposing of property and of rendering herself, and being rendered, liable in respect of any tort, contract, debt or obligation, and of suing and being sued, as if she were a *feme sole*.

## Article 7

### CAPACITY TO ACT AS AGENT

All persons of sound mind, including infants and other persons with limited or no capacity to contract or act on their own behalf, are competent to contract or act as agents. Provided that—

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(*k*) *Macfisheries, Ltd.* v. *Harrison* (1924), 93 L. J. K. B. 811.

(*l*) *Combe's Case*, 9 Co. Rep. 75, where it was held that an infant had no power to appoint an attorney to make a feoffment on his behalf under the custom of gavelkind, though by virtue of the custom he had power to convey by feoffment himself. Modes of assurance by special custom were abolished by the Law of Property Act, 1922 (12 & 13 Geo. 5, c. 16), s. 128 (3).

(*m*) *R.* v. *Longnor* (1833), 4 B. & Ad. 647 ; *Drew* v. *Nunn* (1879), 48 L. J. Q. B. 591 ; 4 Q. B. D. 661, C. A. ; *Elliott* v. *Ince* (1857), 7 De G. M. & G. 475 ; *Campbell* v. *Hooper* (1855), 24 L. J. Ch. 644 ; 3 Sm. & G. 153 ; *Ewer* v. *Jones* (1846), 16 L. J. Q. B. 42 ; 9 Q. B. 623 ; *Ex p. Bradbury, re Walden* (1839), Mont. & Ch. 625 ; *Daily Telegraph Newspaper Co.* v. *M'Laughlin*, [1904] A. C. 776, P. C.

(*n*) *Montreal Assurance Co.* v. *M'Gillivray* (1859), 13 Moo. P. C. C. 87 ; *Bateman* v. *Mid Wales Ry.* (1866), 35 L. J. C. P. 205 ; L. R. 1 C. P. 499 ; *Poulton* v. *L. & S. W. Ry.* (1867), 36 L. J. Q. B. 294 ; L. R. 2 Q. B. 534 ; *Ashbury Carriage Co.* v. *Riche* (1875), 44 L. J. Ex. 185 ; L. R. 7 H. L. 653.

(*o*) 15 Geo. 5, c. 20. Subject to this provision, a power of attorney given by an infant is void : *Zouch* v. *Parsons* (1765), 3 Burr. 1784, 1804.

(*p*) 25 & 26 Geo. 5, c. 30.

(a) no party to a contract is competent to sign a contract, or a note or memorandum thereof, as the agent of another party thereto, so as to satisfy the provisions of the Statute of Frauds, s. 4, the Sale of Goods Act, 1893, s. 4, or the Law of Property Act, 1925, s. 40 (*q*) ;

(b) the personal liability of the agent upon the contract of agency, and upon any contract entered into by him with any third person (*r*), is dependent on his capacity to contract on his own behalf (*s*).

An act done by an agent, as such, is deemed to be the act of the principal who authorised it, the agent being looked upon merely as an instrument : hence the rule that a person having no capacity to contract on his own behalf is competent to contract on behalf of, and so as to bind, his principal. Where an agent, who was unable to read, was authorised to enter into and sign a contract on his principal's behalf, it was held that the principal could not avoid a written contract made by the agent, on the ground of his inability to read it (*t*).

The agent of one party to a contract is not incompetent to act as the agent of the other party thereto, where he can do so consistently with his duty to his principal. Thus, a broker frequently acts for both the buyer and the seller of goods, and an insurance broker may, though he does not necessarily, act as agent for the underwriters as well as the assured (*u*). The signature of a broker employed by both buyer and seller, or of an auctioneer, to a contract of sale, operates as the signature of both parties within the meaning of the Sale of Goods Act, 1893, s. 4, or of the Law of Property Act, 1925, s. 40 (*a*). T, a licensed auctioneer, conducted a sale on behalf of the plaintiffs, a firm of auctioneers, and after a lot had been knocked down to the defendant, signed a memorandum which was agreed to be sufficient to satisfy s. 4 of the Sale of Goods Act, 1893 (*b*) as between the vendor and purchaser. The plaintiffs accounted to the vendor and sued the defendant for the price. It was held (1) that the plaintiffs were entitled to rely on the note signed by T because his name was not on the record in the action brought to enforce the contract, and (2) that since T was a licensed auctioneer and not an auctioneer's clerk, he did not need express authorisation to sign on ascertaining the identity of the buyer (*c*). And it has been held that a clerk or factor of one of the

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(*q*) 29 Car. 2, c. 3 ; 56 & 57 Vict. c. 71 ; 15 Geo. 5, c. 20 ; *Sharman* v. *Brandt* (1871), 40 L. J. Q. B. 312 ; L. R. 6 Q. B. 720 ; *Wright* v. *Dannah* (1809), 2 Camp. 203 ; *Farebrother* v. *Simmons* (1822), 5 B. & A. 333.

(*r*) See Articles 115-124.

(*s*) *Smally* v. *Smally* (1700), 1 Eq. Cas. Ab. 6.

(*t*) *Foreman* v. *G. W. Ry.* (1878), 38 L. T. 851.

(*u*) *Shee* v. *Clarkson* (1810), 12 East 507 ; 11 R. R. 473 ; *Empress Ass. Corpn.* v. *Bowring* (1906), 11 Com. Cas. 107 ; *Glasgow Ass. Corpn.* v. *Symondson* (1911), 104 L. T. 254.

(*a*) 56 & 57 Vict. c. 71 ; 15 Geo. 5, c. 20 ; *Thompson* v. *Gardiner* (1876), 1 C. P. D. 777 ; *Emmerson* v. *Heelis* (1809), 2 Taunt. 38 ; *White* v. *Proctor* (1811), 4 Taunt. 209 ; *Hinde* v. *Whitehouse* (1806), 7 East 558. See also Illustration 4.

(*b*) 56 & 57 Vict. c. 71.

(*c*) *Wilson & Sons* v. *Pike*, [1949] 1 K. B. 176, distinguishing *Farebrother* v. *Simmons*, *supra*.

parties to a contract is competent to act as the agent of the other party for the same purpose (*d*).

A Government does not act as the agent of any of its subjects in making a treaty, or in receiving reparations or other payments thereunder (*e*).

## Article 8

ACTS WHICH MAY BE DONE BY MEANS OF AN AGENT

An agent may be appointed for the purpose of executing any deed, or making any contract, or doing any other act on behalf of the principal, which the principal might himself execute, make, or do ; except for the purpose of exercising a power or authority conferred, or of performing a duty imposed (*f*), on the principal personally, the exercise or performance of which involves discretion or skill (*g*), or for the purpose of doing an act which the principal is required, by or pursuant to any statute, to do in his own proper person.

*Discretionary powers.*—A person who is given a power or authority of a discretionary nature must, as a general rule, exercise it in person. Thus, where the consent of a particular person was required for the execution of a power of appointment, it was held that he had no power to appoint an agent to consent thereto in his place, the authority being one involving personal discretion (*h*). So, the donee of a special power of appointment cannot delegate the power to an agent (*i*). The rules as to delegation of authority by agents are founded upon the same principle (*k*). A person cannot by delegating to an agent or contractor the performance of a duty imposed upon him, escape from liability for the non-performance or improper performance of that duty (*l*). The performance of a duty which is merely ministerial and does not involve discretion or skill, may, however, be delegated, but not so as to avoid liability (*m*).

*Statutes requiring personal performance.*—Lord Tenterden's Act (*n*) requires that representations as to credit, in order to be actionable, must be made

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(*d*) *Durrell* v. *Evans* (1862), 31 L. J. Ex. 337 ; 1 H. & C. 174, Ex. Ch. ; *Bird* v. *Boulter* (1833), 4 B. & Ad. 443.

(*e*) *Rustomjee* v. *R.* (1876), 2 Q. B. D. 69 ; 46 L. J. Q. B. 238, C. A. ; *Civilian War Claimants' Association* v. *R.*, [1932] A. C. 14 ; 101 L. J. K. B. 105 ; *German Property Administrator* v. *Knoop*, [1933] 1 Ch. 439 ; 102 L. J. Ch. 156.

(*f*) See cases cited *ante*, p. 2, note (*e*) ; *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335 ; 65 L. J. Q. B. 363, C. A. ; *Hill* v. *Tottenham U. C.* (1899), 79 L. T. 495 ; *Penny* v. *Wimbledon U. C.*, [1899] 2 Q. B. 722 ; 68 L. J. Q. B. 704, C. A. ; *The Snark*, [1905] P. 105 ; 69 L. J. P. 41, C. A. ; *The Bearn*, [1906] P. 48 ; 75 L. J. P. C. 9, C. A. ; *Robinson* v. *Beaconsfield R. C.*, [1911] 2 Ch. 188 ; 80 L. J. Ch. 647, C. A.

(*g*) Illustration 6. As to the employment of agents by trustees, see Trustee Act, 1925 (15 Geo. 5, c. 19), ss. 23, 25. And see *Speight* v. *Gaunt* (1883), 53 L. J. Ch. 419 ; 9 A. C. 81 ; *Fry* v. *Tapson* (1884), 54 L. J. Ch. 224 ; 18 Ch. D. 268 ; *Bath* v. *Standard Land Co.*, [1911] 1 Ch. 618 ; 80 L. J. Ch. 426, C. A. ; *Re Munton*, [1927] 1 Ch. 262 ; 96 L. J. Ch . 151.

(*h*) *Hawkins* v. *Kemp* (1803), 3 East 410.

(*i*) *Ingram* v. *Ingram* (1740), 2 Atk. 88.

(*k*) See Article 41.

(*l*) See note (*e*), p. 2.

(*m*) *London County Council* v. *Hobbis* (1897), 75 L. T. 688. As to the delegation by a sheriff of his duties, see *Gregory* v. *Cotterell* (1855), 5 E. & B. 571.

(*n*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 6.

in writing, signed by the party to be charged. Such a document must be signed by the party himself, and the signature of an agent is insufficient, even if expressly ratified by the principal (*o*). A proposal for a composition under the Bankruptcy Act, 1914, must be signed by the debtor (*p*). And an agent cannot sign a consent for a party to be added under R. S. C., Ord. 16, r. 11 (*q*). But, as a general rule, where the signature of a person is required by statute, it is sufficient if the name of that person is signed by a duly authorised agent, unless a contrary intention plainly appear (*r*). Thus, an agent may be appointed to subscribe the name of the principal to the memorandum of association of a joint stock company (*s*), or to the instrument of dissolution of a building society (*t*), and such a signature is a sufficient compliance with the Companies Act, 1948 (*u*), s. 3, or the Building Societies Act, 1874 (*x*), s. 32, respectively.

*Illustrations*

1. A foreign corporation by a contract submits to the jurisdiction of the English Courts. It may appoint a person as its agent to accept service of the writ on its behalf, and service on such agent is valid (*a*). So, a person domiciled or ordinarily resident out of the jurisdiction may appoint an agent to accept service of a writ on his behalf within the jurisdiction, and such service is valid service within the jurisdiction on the principal (*b*).

2. A bill of sale may be executed by an attorney on behalf of the grantor, and the grantee of the bill of sale is not necessarily incapable of acting as such attorney (*c*).

3. An agent may be appointed to execute a deed of arrangement (*d*).

4. A written offer to purchase land is made to an agent in his own name, the name of the principal not appearing in the offer. The agent accepts the offer on behalf of his principal, naming him. The offer and acceptance show sufficiently who are the contracting parties to satisfy the Law of Property Act, 1925, s. 40 (*e*). To satisfy the statute, the agreement or memorandum

(*o*) *Williams* v. *Mason* (1873), 28 L. T. 232 ; *Swift* v. *Jewesbury* (1874), 43 L. J. Q. B. 56 ; L. R. 9 Q. B. 301, Ex. Ch. ; *Hirst* v. *West Riding Banking Co.*, [1901] 2 K. B. 560 ; 70 L. J. K. B. 828.

(*p*) 4 & 5 Geo. 5, c. 59, s. 16 ; *Re Blücher*, [1931] 2 Ch. 70 ; 100 L. J. Ch. 292, C. A.

(*q*) *Fricker* v. *Van Grutten*, [1896] 2 Ch. 649 ; 65 L. J. Ch. 823, C. A. See also article on this subject in 170 L.T., p. 369.

(*r*) *France* v. *Dutton*, [1891] 2 Q. B. 208 ; 60 L. J. Q. B. 488. And see *Re African Farms*, [1906] 1 Ch. 640 ; 75 L. J. Ch. 378, where, on a petition for the winding up of a company, the Court accepted an affidavit of the attorney of the petitioner in verification of the petition.

(*s*) *Re Whitley Partners, Ltd.* (1886), 55 L. J. Ch. 540 ; 32 Ch. D. 337, C. A.

(*t*) *Dennison* v. *Jeffs*, [1896] 1 Ch. 611 ; 65 L. J. Ch. 435.

(*u*) 11 & 12 Geo. 6, c. 38.

(*x*) 37 & 38 Vict. c. 42.

(*a*) R. S. C., Ord. II, r. 2A ; *Tharsis Copper Co.* v. *La Société des Metaux* (1889), 58 L. J. Q. B. 435. As to foreign corporations carrying on business within the jurisdiction by means of an agent, see *La Bourgogne*, [1899] A. C. 431 ; 68 L. J. P. 104, H. L. ; *Saccharin Corpn.* v. *Chemische Fabrik von Heyden Actiengesellschaft*, [1911] 2 K. B. 516 ; 80 L. J. K. B. 1117, C. A. ; *Thames and Mersey Marine Ins. Co.* v. *Societa, etc., del Lloyd Austriaco* (1914), 111 L. T. 97, C. A.

(*b*) *Montgomery* v. *Liebenthal*, [1898] 1 Q. B. 487 ; 67 L. J. Q. B. 313, C. A. ; *Reversionary Interest Society* v. *Locking*, [1928] W. N. 227 ; and see R. S. C., Ord. 11, r. 2A.

(*c*) *Furnivall* v. *Hudson*, [1893] 1 Ch. 335 ; 62 L. J. Ch. 178.

(*d*) *Re Wilson*, [1916] 1 K. B. 382 ; 85 L. J. K. B. 329.

(*e*) 15 Geo. 5, c. 20 ; *Filby* v. *Hounsell*, [1896] 2 Ch. 737 ; 65 L. J. Ch. 852.

must name or identify two parties who are contractually bound to each other. The fact that one party knows that the other is acting as an agent does not mean that the agreement ceases to satisfy the statute (*f*).

5. A partner may exercise his right to inspect and take copies from partnership books under section 24 (9) of the Partnership Act, 1890, by means of an agent to whom no personal objection can be made by the co-partners (*g*).

6. Where the rules of a trade union provide that its books shall be open to the inspection of all the members, the members may inspect the books by means of an accountant, the accountant undertaking to use the information obtained only to inform his clients the results of the inspection (*h*). Similarly a " person interested " under the Public Health Act, 1875, s. 247 (4), is entitled to inspect the books and accounts of a local authority by means of an accountant (*i*).

7. An information for an offence against the Metalliferous Mines Regulation Act, 1872, may be laid by an agent duly authorised in that behalf by an inspector under the Act (*k*) ; and a " sampling officer " under the Food and Drugs (Adulteration) Act, 1928, s. 16, may procure a sample by means of an agent, and lay an information in his own name in respect of an analysis of the sample so procured (*l*).

## Article 9

### CO-AGENTS

Where an authority is given to two or more persons, it is presumed to be given to them jointly, unless a contrary intention appear from the nature or terms of the authority, or from the circumstances of the particular case (*m*).

All the co-agents must concur in the execution of a joint authority in order to bind the principal, in the absence of a provision that a certain number of them shall form a quorum (*m*) ; provided that, where the authority is of a public nature, and the persons in whom it is invested all meet for the purpose of executing it, the act of the majority is, for this purpose, deemed to be the act of the whole body (*n*).

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(*f*) *Lovesy* v. *Palmer*, [1916] 2 Ch. 233 ; 85 L. J. Ch. 481 ; *Abdul Karim Basma* v. *Weekes*, [1950] 2 All E. R. 146, disapproving dictum of Luxmoore, L.J., in *Smith-Bird* v. *Blower*, [1939] 2 All E. R. 406.

(*g*) 53 & 54 Vict. c. 39 ; *Bevan* v. *Webb*, [1901] 2 Ch. 59 ; 70 L. J. Ch. 536, C. A.

(*h*) *Norey* v. *Keep*, [1909] 1 Ch. 561 ; 78 L. J. Ch. 334.

(*i*) *R.* v. *Bedwellty U. D. C.*, [1934] 1 K. B. 333 ; 103 L. J. K. B. 152. S. 247 (4) of the Public Health Act, 1875 (38 & 39 Vict. c. 55), has been replaced by s. 224 of the Local Government Act, 1933 (23 & 24 Geo. 5, c. 51).

(*k*) 35 & 36 Vict. c. 37, see s. 35 ; *Foster* v. *Fyfe*, [1896] 2 Q. B. 104 ; 64 L. J. M. C. 184.

(*l*) 18 & 19 Geo. 5, c. 31 ; *Tyler* v. *Dairy Supply Co.* (1908), 98 L. T. 867 ; *Garforth* v. *Essam* (1892), 56 J. P. 521 ; 8 T. L. R. 243.

(*m*) Illustrations 1 to 4 ; *Boyd* v. *Durand* (1809), 2 Taunt. 161.

(*n*) *Grindley* v. *Barker* (1798), 1 B. & P. 229 ; *Cortis* v. *Kent Waterworks Co.* (1827), 7 B. & C. 314.

Where an authority is given to two or more persons severally, or jointly and severally, any one or more of them may execute it without the concurrence of the other or others (*o*).

*Illustrations*

1. A provisional committee appointed eight specified persons to act as a managing committee on their behalf. Six of such persons gave an order within the scope of the authority conferred. Held, that the provisional committee were not bound by the order (*p*).

2. Two persons filled the office of clerk to the trustees of a road. Held, that they must contract jointly in order to bind the trustees (*q*).

3. The regulations of a company provide that the business shall be managed by directors, a certain number of whom shall constitute a board. The company is not bound by the acts of the directors, unless consented to by them all, or by a majority present at a duly convened and constituted board meeting (*r*).

4. The directors of a company, being duly authorised in that behalf, resolved that all their powers, except their power to make calls, should be delegated to three of their number as a committee. Held, that at a meeting of the committee for the purpose of exercising such powers, all the members of the committee must be present (*s*).

5. A power of attorney was given to fifteen persons, "jointly or severally to execute such policies as they or any of them should jointly or severally think proper." Held, that a policy executed by four of such persons was binding on the principal (*t*).

## Article 10

CONTRACT OF AGENCY WILL NOT BE SPECIFICALLY ENFORCED

No action is maintainable at the suit of either principal or agent to compel the specific performance of a contract of agency (*u*). The Court may, however, restrain by injunction the breach of a negative stipulation in such a contract (*x*).

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(*o*) Illustration 5. The law laid down in Co. Litt. 181 (b) as to joint and several authorities given to three or more persons appears to be obsolete.

(*p*) *Brown* v. *Andrew* (1849), 18 L. J. Q. B. 153.

(*q*) *Bell* v. *Nixon* (1832), 9 Bing. 393.

(*r*) *Ridley* v. *Plymouth Grinding Co.* (1848), 2 Ex. 711 ; *Kirk* v. *Bell* (1850), 16 Q. B. 290 ; *D'Arcy* v. *Tamar Ry.* (1866), L. R. 2 Ex. 158 ; *Ex p. Smith* (1888), 39 Ch. D. 546 ; *Re Haycraft, etc., Co.*, [1900] 2 Ch. 230.

(*s*) *Re Liverpool Household Stores* (1890), 59 L. J. Ch. 616.

(*t*) *Guthrie* v. *Armstrong* (1822), 5 B. & A. 628.

(*u*) *White* v. *Boby* (1878), 37 L. T. 652, C. A. ; *Mail* v. *Himalayan Tea Co.* (1865), 14 W. R. 165 ; *Brett* v. *E. I. & L. Shipping Co.* (1864), 10 L. T. 187 ; *Stocker* v. *Wedderburn* (1857), 3 Kay & J. 393 ; *Stocker* v. *Brocklebank* (1851), 20 L. J. Ch. 401 ; 3 Macn. & G. 250 ; *Pickering* v. *Ely* (1843), 2 Y. & Coll. C. C. 249 ; *Whitwood Co.* v. *Hardman*, [1891] 2 Ch. 416 ; 60 L. J. Ch. 428.

(*x*) *Dietrichsen* v. *Cabburn* (1846), 2 Phill. 52 ; *Mutual, etc. Life Ass.* v. *New York Ins. Co.* (1896), 75 L. T. 528, C. A. ; *Kirchner* v. *Gruban*, [1909] 1 Ch. 413 ; 78 L. J. Ch. 117 ; *Chapman* v. *Westerby*, [1913] W. N. 277 ; *Warner* v. *Nelson* (1936), 155 L. T. 538.

### Sect 2.—*Implied Agency of Married Women, etc.*

By the Law Reform (Married Women and Tortfeasors) Act, 1935 (*a*), a married woman is, with minor exceptions, in the same position with regard to property, torts and contracts as if she were a *feme sole*. The implied authority of a wife to pledge the credit of her husband arises partly from her position as manager of his household, partly from his duty to keep her provided with necessaries suitable to her station in life, or to the style in which he permits her to live (*b*). It is restricted to necessaries, either for herself or for the household, and is not increased nor diminished by the insanity or lunacy of the husband (*c*). The existence and nature of the authority depend upon whether she lives with her husband or not ; and if not, upon what is the cause of the separation, and whether it is by mutual consent or otherwise.

There have recently been cases concerning the position of a wife, who, deserted by her husband, remains in the matrimonial home, the tenancy of which is protected by the Rent Restriction Acts. The Acts entitle the husband to remain in possession until a court order is made against him, and this protection extends to his wife, even though the husband purports to relinquish possession by a verbal or written statement (*d*). It has been doubted whether even express revocation by the husband of the wife's authority to remain would in fact have any valid legal effect if the husband had deserted an innocent wife leaving her in the matrimonial home (*e*) ; but *quære* how far the wife is an agent, *e.g.*, to receive notice to quit. A deserted wife is said to be in possession on behalf of the husband, and he is only able to deliver up possession legally by obtaining an order ordering her out of the home (*f*).

## Article 11

PRESUMPTION OF AUTHORITY FROM COHABITATION

Where a husband and wife live together, the mere fact of cohabitation raises a presumption that she has authority to pledge his credit for necessaries suitable to the style in which they live (*g*) ; but there is no presumption of authority to borrow money in his name, even for the purpose of purchasing necessaries for the price of which he would have been liable if they had been bought on his credit (*h*).

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(*a*) 25 & 26 Geo. 5, c. 30, ss. 1-5.

(*b*) See *Phillipson* v. *Hayter* (1870), 40 L. J. C. P. 14 ; L. R. 6 C. P. 38. As to what are considered necessaries, see *Morgan* v. *Chetwynd* (1865), 4 F. & F. 451 ; *Jewsbury* v. *Newbold* (1857), 26 L. J. Ex. 247 ; *Hunt* v. *De Blaquiere* (1829), 5 Bing. 550 ; *Ladd* v. *Lynn* (1837), 2 M. & W. 265 ; *Goodyear* v. *Part* (1897), 13 T. L. R. 395. See also an article on this subject in 17 C. B. R. 354.

(*c*) *Richardson* v. *Du Bois* (1869), 39 L. J. Q. B. 69 ; L. R. 5 Q. B. 51 ; *Read* v. *Legard* (1851), 6 Ex. 636 ; 20 L. J. Ex. 309.

(*d*) *Brown* v. *Draper*, [1944] K. B. 309 ; *Old Gate Estates* v. *Alexander*, [1949] 2 All E. R. 822, C. A.

(*e*) *Old Gate Estates* v. *Alexander*, [1949] 2 All E. R. 822, 824.

(*f*) *Middleton* v. *Baldock*, [1950] 1 K. B. 657.

(*g*) *Gray (Miss), Ltd.* v. *Cathcart* (1922), 38 T. L. R. 562 ; *Harrison* v. *Grady* (1865), 13 L. T. 369 ; *Jolly* v. *Rees* (1864), 33 L. J. C. P. 177 ; 15 C. B. (N.S.) 628 ; *Waithman* v. *Wakefield* (1807), 1 Camp. 120 ; Article 116, Illustration 14.

(*h*) *Knox* v. *Bushell* (1857), 3 C. B. (N.S.) 334. See, however, *Davidson* v. *Wood* (1863), 32 L. J. Ch. 400 ; 1 De G. J. & S. 465 ; *Re Cook, ex p. Vernall* (1892), 10 Mor. 8.

The presumption of authority arising from cohabitation may be rebutted by proof—

(a) that she had not in fact authority to pledge his credit (*i*) ; or

(b) that she was already adequately provided with necessaries, or that her husband had made her a sufficient or agreed allowance therefor (*k*).

*Authority is confined to suitable necessaries.*—The presumption of authority arising from cohabitation is confined to necessaries suitable to the style in which the husband chooses to live (*l*). If the wife order things which are not suitable to his style of living (*m*), or are of an extravagant nature (*n*), or are excessive in quantity (*n*), there is no presumption of authority, and the husband is not liable, unless it be proved that he has expressly authorised her, or held her out as having authority, to give the orders, or that he has ratified the transactions. The question whether the things are suitable necessaries is a question of fact ; and the burden of proof lies on the person supplying them (*l*), except in the case of such things as wearing apparel, delivered at the joint residence, which are presumed to be necessaries until the contrary is shown (*o*). The mere fact that the wife has a separate income is not sufficient to rebut the presumption of authority (*p*).

*Effect of forbidding her to pledge his credit.*—Even in the case of suitable necessaries, the presumption of authority may be rebutted by proof that she had no authority. The question whether the wife acted as her husband's agent, and with his authority, in any particular transaction, is a question of fact (*q*) ; and the proper question to leave to a jury is whether the things were supplied to his credit and with his authority, not merely whether they were suitable necessaries (*r*). If she did not intend to pledge his credit, but contracted on her own behalf (*s*), or if, though she intended to pledge his credit,

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(*i*) *Jolly* v. *Rees* (1864), 32 L. J. C. P. 177 ; 15 C. B. (N.S.) 628 ; *Debenham* v. *Mellon* (1880), 6 App. Cas. 24; (1880), 50 L. J. Q. B. 155, H. L.; *Gray (Miss), Ltd.* v. *Cathcart, supra.*

(*k*) *Seaton* v. *Benedict* (1828), 5 Bing. 28 ; *Debenham* v. *Mellon, supra ; Reneaux* v. *Teakle* (1853), 8 Ex. 680; 22 L. J. Ex. 241 ; 91 R. R. 703; *Remmington* v. *Broadwood* (1902), 18 T. L. R. 270, C. A. ; *Morel* v. *Westmoreland,* [1904] A. C. 11 ; 73 L. J. K. B. 93, H. L.

(*l*) *Phillipson* v. *Hayter* (1870), 40 L. J. C. P. 14 ; L. R. 6 C. P. 38.

(*m*) *Harrison* v. *Grady* (1865), 13 L. T. 369 ; *Montagu* v. *Benedict* (1825), 5 D. & R. 532 ; *Atkins* v. *Curwood* (1837), 7 C. & P. 756.

(*n*) *Debenham* v. *Mellon* (1880), 6 App. Cas. 24 ; 50 L. J. Q. B. 155, H. L. ; *Lane* v. *Ironmonger* (1844), 14 L. J. Ex. 35 ; 13 M. & W. 368 ; *Freestone* v. *Butcher* (1840), 9 C. & P. 643.

(*o*) *Jewsbury* v. *Newbold* (1857), 26 L. J. Ex. 247 ; *Clifford* v. *Laton* (1827), 3 C. & P. 15.

(*p*) *Seymour* v. *Kingscote* (1922), 38 T. L. R. 586 ; *Callott* v. *Nash* (1923), 39 T. L. R. 292.

(*q*) *Lane* v. *Ironmonger* (1844), 13 M. & W. 368 ; 14 L. J. Ex. 35 ; 67 R. R. 647 ; *Freestone* v. *Butcher* (1840), 9 C. & P. 643.

(*r*) *Reid* v. *Teakle* (1853), 13 C. B. 627 ; 22 L. J. C. P. 161 ; *Shoolbred* v. *Baker* (1867), 16 L. T. 359.

(*s*) *Freestone* v. *Butcher, supra.*

he had in fact forbidden her to do so (*t*), he is not liable, even if the person who supplied the necessaries had no notice that her authority had been revoked (*t*), unless he had invested her with an appearance of authority, or had done some act leading the plaintiff to suppose that she had his authority to order them (*t*). But if, by words or conduct, he hold her out as having authority, he is liable to any person dealing with her on the faith of such holding out, notwithstanding a revocation of her authority, and though he had expressly forbidden her to pledge his credit, unless such person had actual notice of the revocation or prohibition (*u*).

A claim by a wife against her husband's estate for arrears of maintenance which he was liable to pay under an order made under the Summary Jurisdiction (Married Women) Act, 1895 (*x*), could not be founded on a wife's right to pledge her husband's credit for necessaries (*y*).

## Article 12

### IMPLIED AUTHORITY AS HOUSEKEEPER

Where a wife, who is living with her husband, has the management of the household, she is his general agent in all household matters, and has implied authority to pledge his credit for all such things as are necessary in the ordinary course of such management, and are usually bought on credit (*z*).

Every act done by a wife within the scope of her implied authority as manager of his household binds the husband, unless she has in fact no authority to do the particular act, and the person dealing with her has, at the time of the transaction, notice that she is exceeding her actual authority (*a*).

Where a wife occupies the position of her husband's housekeeper, he is deemed to hold her out as having the usual authority of a housekeeper, and is bound by all acts within the scope of such apparent authority, unless the persons dealing with her know that her authority is expressly limited, and that she is acting in excess thereof (*b*). Her implied authority as housekeeper is, however, confined to domestic necessaries suitable to the style in which the husband lives, and it does not extend to articles of luxury (*c*). The onus of proof that goods supplied on her orders are suitable necessaries lies on the persons supplying them (*c*).

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(*t*) *Jolly* v. *Rees* (1864), 33 L. J. C. P. 177 ; 15 C. B. (N.S.) 628 ; *Debenham* v. *Mellon supra*. See also *Paquin* v. *Beauclerk*, [1906] A. C. 148 ; 75 L. J. K. B. 395, and p. 239, *infra*.

(*u*) *Jetley* v. *Hill* (1884), 1 C. & E. 239 ; *Filmer* v. *Lynn* (1835), 4 N. & M. 559 ; *Debenham* v. *Mellon*, *supra*. And see Article 12.

(*x*) 58 & 59 Vict. c. 39.

(*y*) *Re Bidie*, *Bidie* v. *General Accident Fire and Life Assurance Corporation*, [1949] Ch. 121 ; [1949] L. J. R. 386 (reversing in part, [1948] Ch. 697).

(*z*) *Emmett* v. *Norton* (1838), 8 C. & P. 506 ; *Phillipson* v. *Hayter* (1870), 40 L. J. C. P. 14 ; L. R. 6 C. P. 38.

(*a*) Illustrations 1 and 2 ; *Debenham* v. *Mellon* (1880), 6 App. Cas. 24 ; 50 L. J. Q. B. 155, H. L.

(*b*) See note (*z*), *ante*.

(*c*) *Phillipson* v. *Hayter*, *supra*.

*Illustrations*

1. The wife of a labourer ordered provisions for the house. The husband was held liable for the price, though he had supplied his wife with sufficient money to keep house, the person supplying the goods having had no notice of that fact (*d*).

2. A husband, during temporary absence from home, made his wife a sufficient allowance for herself and the family. A tradesman supplied her with goods on credit, knowing that the husband had made her the allowance. Held, that the husband was not liable for the price of the goods (*e*).

## Article 13

NO AUTHORITY, PRIMA FACIE, DURING SEPARATION

Where a wife is separated from her husband, she has, *prima facie*, no authority to pledge his credit, and the burden lies upon any person seeking to charge the husband on her contracts of proving that the circumstances of the separation are such as to raise a presumption of authority (*f*).

Where a wife is judicially separated from her husband, or has obtained a protection or separation order, he is not liable in respect of any contract she may enter into, nor for any costs she may incur, while so separated (*g*) ; provided that where alimony has been decreed or ordered to be paid to the wife, and is not duly paid, the husband is liable for necessaries supplied for her use (*h*).

Where a tradesman gives credit to a wife living apart from her husband he ought to make inquiries as to the cause of the separation ; otherwise he trusts her at his peril, and is not entitled to charge the husband, unless he prove that she is justified in living apart (*i*). Where the husband was living abroad, and it was sought to charge him for necessaries supplied to his wife in England, it was held that the plaintiff must prove that she was not sufficiently provided for, and that it was necessary for her to pledge her husband's credit (*k*). Even if the tradesman have no notice of the separation, he is not entitled to charge the husband unless the circumstances justify the wife in living apart, or the husband has held her out as having authority to pledge his credit (*l*).

(*d*) *Ruddock* v. *Marsh* (1857), 1 H. & N. 601. But see *Morel* v. *Westmoreland*, [1904] A. C. 11 ; 73 L. J. K. B. 93, H. L.

(*e*) *Holt* v. *Brien* (1821), 4 B. & A. 252.

(*f*) *Edwards* v. *Towels* (1843), 12 L. J. C. P. 239 ; 6 Scott, N. R. 641 ; *Johnston* v. *Sumner* (1858), 27 L. J. Ex. 341 ; 3 H. & N. 261 ; 117 R. R. 769.

(*g*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21 ; Matrimonial Causes Act, 1864 (27 & 28 Vict. c. 44), s. 1 ; both repealed as to the High Court by the Judicature Act, 1925 (15 & 16 Geo. 5, c. 49), s. 226, Sch. VI ; and see *ibid.*, s. 194, and note (*h*), *post* ; Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5 (a) ; Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 & 16 Geo. 5, c. 51), s. 2 ; *Re Wingfield*, [1904] 2 Ch. 665 ; 73 L. J. Ch. 797, C. A.

(*h*) Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30), Sch. I.

(*i*) *Mainwaring* v. *Leslie* (1826), 2 C. & P. 507 ; *Reed* v. *Moore* (1832), 5 C. & P. 200 ; *Clifford* v. *Laton* (1827), 3 C. & P. 15.

(*k*) *Bird* v. *Jones* (1828), 3 M. & R. 121. See also *Dennys* v. *Sargeant* (1834), 6 C. & P. 419.

(*l*) *Wallis* v. *Biddick* (1873), 22 W. R. 76.

A decree for judicial separation does not affect the liability of the husband under a contract made by the wife prior to the decree. Where a solicitor was retained by a wife, in pursuance of her implied authority to pledge her husband's credit, to defend divorce proceedings instituted by him, and also to conduct an action of detinue against him, it was held that the retainer was not determined by a decree for judicial separation, and that the husband was liable to the solicitor for costs incurred in pursuance of the retainer after as well as before the decree, but that he would not be liable on a retainer given by the wife subsequent to the decree (*m*).

## Article 14

### WHERE SEPARATED BY MUTUAL CONSENT

Where husband and wife are separated by mutual consent, and there is an agreement between them as to her maintenance, she has no implied authority to pledge his credit so long as he duly complies with the terms of the agreement, whether she is adequately provided for or not (*n*) ; but if the terms of the agreement be not duly complied with by the husband, she has implied authority to pledge his credit for necessaries suitable to her station in life (*o*).

Where husband and wife are separated by mutual consent, and there is no agreement between them as to her maintenance, she has implied authority to pledge his credit for necessaries suitable to her station in life, unless she has adequate separate means, or is provided with an adequate allowance, either by her husband or some other person (*p*).

Where the wife is permitted to have the custody of the children, necessaries for them are deemed to be necessaries for her (*q*).

*Effect of the husband's misconduct, where separated by mutual consent.*—In *Biffin* v. *Bignell* (*r*), the Court of Exchequer laid down that, where a husband consents to a separation on condition that his wife shall accept a certain allowance, she has no implied authority to pledge his credit so long as the allowance is duly paid, even if it be inadequate, unless he has been guilty of such misconduct as to justify her in living apart without his consent ; because, by not fulfilling the conditions on which his consent was given, she is, in effect, living apart without his consent. But in *Negus* v. *Forster* (*s*), where there had been an agreement for a separation with an allowance of £100 a year, and the parties had resumed cohabitation, and then again separated, and the wife had subsequently obtained a judicial separation with alimony of £180 a year, on the ground of the husband's misconduct prior to the second

(*m*) *Re Wingfield, supra.* See also Article 16.
(*n*) *Eastland* v. *Burchell* (1878), 47 L. J. Q. B. 500 ; 3 Q. B. D. 432 ; *Negus* v. *Forster* (1882), 46 L. T. 675, C. A.
(*o*) *Beale* v. *Arabin* (1877), 36 L. T. 249.
(*p*) *Johnston* v. *Sumner* (1858), 27 L. J. Ex. 341 ; 3 H. & N. 261 ; 117 R. R. 769 ; *Harvey* v. *Norton* (1840), 4 Jur. 42.
(*q*) *Rawlyns* v. *Vandyke* (1800), 3 Esp. 250.
(*r*) (1862), 31 L. J. Ex. 189 ; 7 H. & N. 877.
(*s*) (1882), 46 L. T. 675, C. A.

separation, it was held by the Court of Appeal that the £100 a year having been regularly paid, the original separation deed was a good defence to an action for the price of necessaries supplied to the wife after the second separation but before the decree for judicial separation and alimony. And it would, therefore, seem that misconduct of the husband, combined with inadequacy of the wife's income, does not give her implied authority to pledge his credit, where the amount of such income has been expressly agreed upon, and is duly paid.

*Where no agreement as to maintenance.*—Where there has been no agreement as to the amount of her allowance or as to her maintenance, the liability of a husband, who consents to his wife living apart, for the price of necessaries supplied to her on his credit, depends upon whether she is adequately provided for or not. If he pay her an adequate allowance, she has no implied authority to pledge his credit (*t*), and he is not liable for the price of things supplied to her, even if the person supplying them has no notice of the allowance (*u*). So, he is not liable for things supplied to her, if he can show that she has adequate separate means (*a*), or that she receives adequate maintenance from some source, whether he supplies it or not (*b*). The question of adequacy is a question of fact. Where the allowance is inadequate, and she is not otherwise sufficiently provided for according to her station in life, she has implied authority to pledge his credit for suitable necessaries, though she may have acquiesced in the amount of the allowance (*c*).

## Article 15

### WHERE LIVING APART WITHOUT THE HUSBAND'S CONSENT

Where a wife leaves her husband without his consent, or lives apart from him contrary to his wishes, she has no implied authority to pledge his credit, unless he has been guilty of such misconduct as to justify her in so leaving him or living apart (*d*).

## Article 16

### WHERE LIVING APART IN CONSEQUENCE OF HUSBAND'S MISCONDUCT, ETC.

Where a wife has been deserted by her husband (*e*), or has been turned away by him without adequate cause (*f*), or has left him

(*t*) *Mizen* v. *Pick* (1838), 7 L. J. Ex. 153 ; 3 M. & W. 481 ; *Holder* v. *Cope* (1846), 2 C. & K. 437 ; *Emmett* v. *Norton* (1838), 8 C. & P. 506 ; *Hodgkinson* v. *Fletcher* (1814), 4 Camp. 70.

(*u*) *Reeve* v. *Conyngham* (1847), 2 C. & K. 444 ; *Mizen* v. *Pick*, *supra*.

(*a*) *Lidlow* v. *Wilmot* (1817), 2 Stark. 86.

(*b*) *Clifford* v. *Laton* (1827), 3 C. & P. 15 ; *Dixon* v. *Hurrell* (1838), 8 C. & P. 717.

(*c*) *Hodgkinson* v. *Fletcher* (1814), 4 Camp. 70.

(*d*) *Hindley* v. *Westmeath* (1827), 6 B. & C. 200 ; *Johnston* v. *Sumner* (1858), 27 L. J. Ex. 341 ; 3 H. & N. 261 ; *Swan* v. *Mathieson* (1911), 103 L. T. 832. Although an authority given before separation and not revoked may continue after separation : *Hawthorne Bros.* v. *Reilly*, [1949] A. L. R. 552.

(*e*) *Wilson* v. *Ford* (1868), 37 L. J. Ex. 60 ; L. R. 3 Ex. 63.

(*f*) *Harrison* v. *Grady* (1865), 13 L. T. 369 ; *Forristall* v. *Lawson*, *Connelly* v. *Lawson* (1876), 34 L. T. 903 ; *Thompson* v. *Hervey* (1768), 4 Burr. 2177.

in consequence of misconduct on his part which justifies her in so leaving him (*g*), and is living apart from him, it is an irrebuttable presumption of law that she has authority to pledge his credit—

(a) for necessaries suitable to her station in life, unless she is adequately provided for ;

(b) for costs reasonably incurred in taking proceedings against him (*h*) ; and

(c) where she has been given the custody of the children by reason of his misconduct, for their maintenance and education, even if they be living with her contrary to his wishes (*i*).

Where a wife is separated from her husband under any of the circumstances specified in this article, he is bound in equity to repay money lent to her for, and expended in, the purchase of necessaries (*k*).

The authority referred to in this article is said to be an authority of necessity (*l*), and the husband is bound to pay for things ordered by the wife in the exercise thereof, even if he gave the person supplying them express notice not to trust her (*m*). The fact that he makes her an allowance is no defence, if the allowance be inadequate (*n*). But where alimony has been decreed, and duly paid, it will be presumed to be sufficient (*o*).

A person wishing to recover from the husband advances made to the wife must prove not only that the advances were intended for the wife's support, but also that they were, in fact, needed for her support (*p*).

*Costs of legal proceedings.*—Where a wife is turned away by her husband, or is compelled to leave him in consequence of his violence, and it is necessary to take proceedings to oblige him to keep the peace, he is liable for the costs of such proceedings, as between solicitor and client, even if he allow her an adequate separate maintenance (*q*). So, a wife has implied authority to pledge her husband's credit for costs, as between solicitor and client, reasonably incurred in the institution and prosecution of proceedings for divorce (*r*). And it has been held that he is liable for costs incurred by her in filing a petition for judicial separation, even if it be not proceeded with, provided

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(*g*) *Houliston* v. *Smyth* (1825), 3 Bing. 127.

(*h*) *Ottaway* v. *Hamilton* (1878), 47 L. J. C. P. 725 ; 3 C. P. D. 393, C. A. ; *Wilson* v. *Ford*, *supra*. This does not extend to the costs of an indictment for assault : *Grindell* v. *Godmond* (1836), 6 L. J. K. B. 31 ; 1 N. & P. 168.

(*i*) *Bazeley* (or *Baseley*) v. *Forder* (1868), 37 L. J. Q. B. 237 ; L. R. 3 Q. B. 559 ; *Collins* v. *Cory* (1901), 17 T. L. R. 242.

(*k*) *Jenner* v. *Morris* (1861), 30 L. J. Ch. 361 ; *Deare* v. *Soutten* (1869), L. R. 9 Eq. 151 ; *Harris* v. *Lee* (1718), 1 P. W. 482. *May* v. *Skey* (1849), 16 Sim. 588, is overruled.

(*l*) *Johnston* v. *Sumner* (1858), 27 L. J. Ex. 341 ; 3 H. & N. 261.

(*m*) *Harris* v. *Morris* (1801), 4 Esp. 41 ; and see Article 17, Illustration 4.

(*n*) *Baker* v. *Sampson* (1863), 14 C. B. (N.S.) 383.

(*o*) *Willson* v. *Smyth* (1831), 1 B. & Ad. 801. And see Article 13.

(*p*) *Weingarten* v. *Engel*, [1947] 1 All E. R. 425.

(*q*) *Shepherd* v. *Mackoul* (1813), 3 Camp. 326 ; *Turner* v. *Rooks* (1839), 10 Ad. & El. 47 ; 8 L. J. Q. B. 211 ; 2 Per. & Dav. 294 ; *Williams* v. *Fowler* (1825), M'Clel. & Y. 269.

(*r*) *Ottaway* v. *Hamilton* (1878), 3 C. P. D. 393 ; 47 L. J. C. P. 725, C. A. ; *Stocken* v. *Pattrick* (1873), 29 L. T. 507 ; *Re Wingfield*, [1904] 2 Ch. 665 ; 73 L. J. Ch. 797, C. A.

there are reasonable grounds therefor (*s*). But in such cases the solicitor ought, before commencing proceedings, to make proper investigation and inquiry into all the circumstances ; and he is not entitled to recover the costs of unsuccessful proceedings from the husband, unless he can show that there was at least great probability of success (*t*). McCardie, J., did not follow the *dicta* in *Taylor* v. *Hailstone* (*s*) and *Re Hooper* (*t*), but after reviewing the cases, he evolved the principle that a solicitor can recover his costs if he acted on reasonable grounds, made adequate inquiries, and showed proper diligence and care (*u*). Where a husband had deserted his wife without cause, and left her without means of subsistence, it was held that she had implied authority to pledge his credit for the costs—(a) of a suit for restitution of conjugal rights ; (b) of taking counsel's opinion as to whether a verbal promise of a settlement made by the husband at the time of the marriage could be enforced in equity ; and (c) of consultations with her solicitor as to the best means of dealing with tradesmen who had supplied her with necessaries and were pressing her for money, and also with the landlord of a house in which she and her husband had lived, who was threatening to distrain for rent upon furniture which had been hers before marriage (*a*).

*What degree of misconduct justifies a wife in leaving her husband.*—It was decided in *Horwood* v. *Heffer* (*b*) that no amount of ill-treatment, short of personal violence, or such as to induce a reasonable fear of personal violence, would entitle a wife to pledge her husband's credit after leaving his house without his consent. But in *Houliston* v. *Smyth* (*c*) it was laid down that such conduct as bringing a prostitute into the house, or threatening to confine the wife in a madhouse, was equivalent to turning her away. It is clear that such cruelty as renders it no longer safe for the wife to remain in the house (*d*), or such conduct as causes a reasonable apprehension of personal violence (*e*), justifies her in leaving her husband, and living apart from him.

## Article 17

### EFFECT OF ADULTERY BY THE WIFE

A husband is under no obligation to support his wife, and she has no implied authority to pledge his credit, whether they live together or not, and even where he has himself been guilty of misconduct, after she has committed adultery, unless he connived at or has condoned the offence (*f*). Provided, that if, being aware of her adultery, he continues to hold her out as his agent, he is

(*s*) *Rice* v. *Shepherd* (1862), 12 C. B. (N.S.) 332 ; *Brown* v. *Ackroyd* (1856), 25 L. J. Q. B. 193 ; 5 El. & Bl. 819 ; *Taylor* v. *Hailstone* (1882), 52 L. J. Q. B. 101. But see *Cale* v. *James*, [1897] 1 Q. B. 418 ; 66 L. J. Q. B. 249.

(*t*) *Re Hooper*, *Baylis* v. *Watkins* (1864), 33 L. J. Ch. 300 ; *Walker* v. *Walker* (1897), 76 L. T. 234 ; *Beer* v. *Beer* (1906), 22 T. L. R. 367.

(*u*) *Abrahams* v. *Buckley*, [1924] 1 K. B. 903; 93 L. J. K. B. 603.

(*a*) *Wilson* v. *Ford* (1868), L. R. 3 Ex. 63 ; 37 L. J. Ex. 60.

(*b*) (1811), 3 Taunt. 421.

(*c*) (1825), 3 Bing. 127 ; 28 R. R. 609 ; *Tempany* v. *Hakewill* (1858), 1 F. & F. 438.

(*d*) *Emery* v. *Emery* (1827), 1 Y. & J. 501 ; *Baker* v. *Sampson* (1863), 14 C. B. (N.S.) 383 ; *Hodges* v. *Hodges* (1796), 1 Esp. 441.

(*e*) *Brown* v. *Ackroyd* (1856), 25 L. J. Q. B. 193 ; 5 El. & Bl. 819.

(*f*) Illustrations 1, 2 and 5; *Manby* v. *Scott* (1660), 1 Lev. 4.

liable to the same extent as if her authority had continued, with respect to any persons dealing with her on the faith of such holding out, without notice of the determination of her authority (*g*).

Where a husband connives at or has condoned his wife's adultery, her implied authority is not affected thereby (*h*).

*Illustrations*

1. A husband committed adultery with a woman whom he brought to the house where he lived with his wife, and, after treating his wife with great cruelty, turned her out of doors. Then the wife committed adultery, after which she offered to return home, but her husband refused to receive her. Held, that the husband was not liable for necessaries supplied to her after her adultery (*i*).

2. A husband turns his wife away without cause. She commits adultery. He is not liable for goods supplied to her after the adultery, although the person supplying them had no notice of the adultery (*k*), and the goods were necessaries (*l*).

3. A husband connives at his wife's adultery, and then turns her away. She has implied authority to pledge his credit for necessaries, and he is liable for the price thereof, even if he gave express notice to the person supplying them not to trust her (*m*). The same rule applies where a husband condones his wife's adultery, and subsequently turns her away (*n*).

4. A husband, knowing of his wife's adultery, permitted her to continue living in his house with the children. Held, that he was liable for the price of necessaries supplied to her by a tradesman who was ignorant of the circumstances (*o*).

5. *Costs of legal proceedings.*—A wife who has committed adultery has no implied authority, in the absence of connivance or condonation by her husband, to pledge his credit for the costs of divorce proceedings brought by her (*p*) or by her husband (*q*) ; and this rule prevails, although the wife's solicitor be unaware of her adultery and although the wife's offence consist of one act of adultery only (*r*).

## Article 18

IMPLIED AUTHORITY TO ACKNOWLEDGE DEBTS FOR NECESSARIES

Whenever a wife has authority to pledge her husband's credit, she has also implied authority to acknowledge on his behalf a debt incurred in pursuance thereof, and such an acknowledgment, if

(*g*) Illustration 4. (*h*) Illustration 3.
(*i*) *Govier* v. *Hancock* (1796), 6 T. R. 603.
(*k*) *Emmett* v. *Norton* (1838), 8 C. & P. 506 ; *Atkyns* v. *Pearce* (1857), 26 L. J. C. P. 252 ; 2 C. B. (N.S.) 763.
(*l*) *Hardie* v. *Grant* (1838), 8 C. & P. 512 ; *Cooper* v. *Lloyd* (1859), 6 C. B. (N.S.) 519.
(*m*) *Wilson* v. *Glossop* (1888), 20 Q. B. D. 354 ; 57 L. J. Q. B. 161, C. A.
(*n*) *Harris* v. *Morris* (1801), 4 Esp. 41 ; *Robinson* v. *Gosnold* (1703), 6 Mod. 171.
(*o*) *Norton* v. *Fazan* (1798), 1 B. & P. 226.
(*p*) *Durnford* v. *Baker*, [1924] 2 K. B. 587 ; 93 L. J. K. B. 866, C. A.
(*q*) *Arnold* v. *Amari*, [1928] 1 K. B. 584 ; 97 L. J. K. B. 238.
(*r*) *Wright* v. *Annandale*, [1930] 2 K. B. 8 ; 99 L. J. K. B. 444, C. A.

in writing and signed by her, interrupts the operation of the Statute of Limitations (*s*).

## Article 19

HUSBAND NOT LIABLE UNLESS CREDIT GIVEN TO HIM

No husband is liable for the price of necessaries supplied to his wife, whether they live together or not, where exclusive credit is given to the wife (*t*), or to some third person, by the person supplying them.

Thus, where a wife, separated from her husband with his consent, lived with her uncle, and ordered necessaries from a tradesman who gave credit to the uncle, and whose former bills for goods supplied to her had been paid by the uncle, it was held that the husband was not liable, though he did not make his wife any allowance (*u*). But the mere fact that the things are booked in the wife's name is not conclusive evidence of an intention to give credit to her alone. The question is whether, at the time when the contract was made, the person supplying the things intended to give credit to her to the exclusion of her husband (*a*). If, however, the wife be sued to judgment, that is conclusive evidence of an election to give exclusive credit to her (*b*).

## Article 20

AUTHORITY PRESUMED FROM COHABITATION AS MAN AND WIFE

Where a man lives with a woman as his wife, she has authority to pledge his credit, during the continuance of the cohabitation, to the same extent as if she were legally married to him (*c*).

Where there is no cohabitation, the mere fact that a man permits a woman to assume his name is not sufficient to raise a presumption of authority to pledge his credit (*d*). But if they live together as man and wife, he is liable for the price of necessaries supplied to her on his credit, even if the tradesman knew when he supplied them that they were not married (*e*). This presumed authority determines on a separation, and the mere fact that he had represented her to be his wife does not render him liable for the price of necessaries supplied to her after the separation (*e*). If, however, he held her out to third persons as his agent, they are entitled to deal with her as such, and to charge him accordingly, until they receive notice that the connection has determined (*f*).

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(*s*) *Gregory* v. *Parker* (1808), 1 Camp. 394 ; see Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), ss. 23, 24. But see *Ingram* v. *Little* (1883), 1 C. & E. 186 (unsigned acknowledgment sent with letter signed by wife referring thereto, held not a sufficient acknowledgment).

(*t*) *Bentley* v. *Griffin* (1814), 5 Taunt. 356 ; *Metcalfe* v. *Shaw* (1811), 3 Camp. 22 ; *Callot* v. *Nash* (1923), 39 T. L. R. 292.

(*u*) *Harvey* v. *Norton* (1840), 4 Jur. 42. See also *Reeve* v. *Conyngham* (1847), 2 C. & K. 444.

(*a*) *Jewsbury* v. *Newbold* (1857), 26 L. J. Ex. 247.

(*b*) Article 97.

(*c*) *Watson* v. *Threlkeld* (1794), 2 Esp. 637 ; *Ryan* v. *Sams* (1848), 12 Q. B. 460 ; 17 L. J. Q. B. 271 ; *Blades* v. *Free* (1829), 9 B. & C. 167.

(*d*) *Gomme* v. *Franklin* (1859), 1 F. & F. 465.

(*e*) *Munro* v. *De Chemant* (1815), 4 Camp. 215.

(*f*) *Ryan* v. *Sams* (1848), 12 Q. B. 460 ; 17 L. J. Q. B. 271.

## Article 21

CHILD HAS NO IMPLIED AUTHORITY TO PLEDGE PARENT'S CREDIT

Children have no implied authority, as such, to pledge the credit of their parents, even for the supply of necessaries.

In the absence of proof of an express or implied contract on his part, a father is no more liable than a stranger for debts incurred by his child without his authority ; and the obligation to maintain his children affords no legal inference of a promise to pay for necessaries supplied to them (*g*). To render a parent liable for things supplied to his child, the person supplying them must give some evidence of his authority or assent (*h*) ; but slight evidence of authority may be sufficient (*i*).

## SECT. 3.—*Appointment of Agents*

## Article 22

APPOINTMENT IN GENERAL

Subject to the provisions of Articles 23 and 24, and except where otherwise expressly provided by or pursuant to any statute, or by the terms of the power or authority (if any) under which the agent is appointed, an agent may be appointed either by deed, by writing, or merely by word of mouth.

An agent may be appointed by word of mouth, even when he is authorised to enter into a contract required by statute to be in writing (*a*) ; unless the statute require appointment in writing (*b*). Letters written by an agent within the scope of his authority, and signed by him, are a sufficient memorandum if they contain the terms of an agreement entered into by his principal, or refer to other documents containing such terms, although the agent was not specifically authorised to sign a memorandum for the purpose of binding his principal (*c*). So, authority to subscribe the name of the principal to the memorandum of association of a joint stock company, or to the instrument of dissolution of a building society, may be given orally (*d*).

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(*g*) *Shelton* v. *Springett* (1851), 11 C. B. 452 ; *Mortimer* v. *Wright* (1840), 6 M. & W. 482 ; *Crantz* v. *Gill* (1796), 2 Esp. 471.

(*h*) *Rolfe* v. *Abbott* (1833), 6 C. & P. 286.

(*i*) *Law* v. *Wilkins* (1837), 6 A. & E. 718 ; *Baker* v. *Keen* (1819), 2 Stark. 501.

(*a*) *Mortlock* v. *Buller* (1804), 10 Ves. 291, 311 ; 7 R. R. 417 ; *Coles* v. *Trecothick* (1804), 9 Ves. 234, 249a ; *Deverell* v. *Bolton* (1812), 18 Ves. 505, 509 ; *Graham* v. *Musson* (1839), 7 Scott 769, 778 ; 8 L. J. C. P. 324 ; *Heard* v. *Pilley* (1869), L. R. 4 Ch. 548 ; 38 L. J. Ch. 718 ; *Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 22. Provisions similar to those contained in this Chapter are stated and discussed in §§ 26-31 of the American Restatement.

(*b*) See, for example, the Law of Property Act, 1925 (15 Geo. 5, c. 20), ss. 53, 54.

(*c*) *Griffiths Cycle Corpn.* v. *Humber*, [1899] 2 Q. B. 414 ; 68 L. J. Q. B. 969, C. A. ; *Daniels* v. *Trefusis*, [1914] 1 Ch. 788 ; 83 L. J. Ch. 579. An entry in the minute book of a company, signed by the chairman, is a sufficient memorandum : *Jones* v. *Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314 ; 46 L. J. Q. B. 219.

(*d*) *Re Whitley Partners* (1886), 32 Ch. D. 337 ; 55 L. J. Ch. 540, C. A. ; *Dennison* v. *Jeffs*, [1896] 1 Ch. 611 ; 65 L. J. Ch. 435.

*Agent to purchase land.*—A contract for the purchase of land made by an agent as such, vests the equitable estate in the principal, and the contract may be enforced by the principal as against both the vendor and the agent, even if the agent were appointed orally, provided that the legal estate has not been conveyed to him (*e*). Where the land has been conveyed to the agent, so as to vest the legal estate in him, he is a trustee for the principal, and is not entitled to take advantage of the Law of Property Act, 1925 (*f*), s. 53, which provides that a declaration of trust respecting any land or any interest therein must be manifested and proved by writing (*g*).

*Retainer of Solicitor.*—A solicitor may be appointed by word of mouth to institute an action or suit, but the burden of proving that he was authorised lies in all cases upon him, and therefore, as a general rule, he ought, for his own protection, to require a written retainer (*h*).

## Article 23

### AUTHORITY TO EXECUTE A DEED

Where an agent is authorised to execute a deed on behalf of his principal, his authority must be given by an instrument under seal (*i*), except where the deed is executed in the name and presence of the principal and the authority to execute it is given by him there and then, in which case it may be given by word of mouth or by signs (*k*).

So, a partner cannot bind his firm or the other partners by deed, unless expressly authorised under seal to do so (*l*), except where the deed is executed by the authority and in the presence of all the partners (*m*).

## Article 24

### APPOINTMENT BY CORPORATIONS

The appointment of an agent by a corporation must be under its common seal (*n*). Provided, that this rule does not apply to

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(*e*) *Heard* v. *Pilley* (1869), L. R. 4 Ch. 548 ; 38 L. J. Ch. 718 ; *Cave* v. *Mackenzie* (1877), 46 L. J. Ch. 564.

(*f*) 15 Geo. 5, c. 20.

(*g*) *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196 ; 66 L. J. Ch. 74.

(*h*) *Lord* v. *Kellett* (1833), 2 Myl. & K. 1 ; *Wiggins* v. *Peppin* (1837), 2 Beav. 403 ; *Allen* v. *Bone* (1841), 4 Beav. 493 ; *Pinner* v. *Knights* (1843), 6 Beav. 174 ; *Re Manby* (1856), 26 L. J. Ch. 313 ; *Maries* v. *Maries* (1853), 23 L. J. Ch. 154 ; *Owen* v. *Ord* (1828), 3 C. & P. 349 ; *Tabbernor* v. *Tabbernor* (1836), 2 Keen 679 ; *Atkinson* v. *Abbott* (1855), 3 Drew. 251.

(*i*) *Berkeley* v. *Hardy* (1826), 5 B. & C. 355.

(*k*) *R.* v. *Longnor* (1833), 4 B. & Ad. 647.

(*l*) *Harrison* v. *Jackson* (1797), 7 T. R. 207.

(*m*) *Ball* v. *Dunsterville* (1791), 4 T. R. 313 ; *Burn* v. *Burn* (1798), 3 Ves. 578.

(*n*) *Kidderminster Corporation* v. *Hardwicke* (1873), L. R. 9 Ex. 13 ; 43 L. J. Ex. 9 ; *R.* v. *Stamford* (1844), 6 Q. B. 433 ; *Smith* v. *Cartwright* (1851), 6 Ex. 927 ; 20 L. J. Ex. 401.

trading corporations (*o*), joint stock companies (*p*), or industrial and provident societies (*q*), nor where its application would, by reason of the frequent recurrence, insignificance, or urgency of the acts to be done, cause great inconvenience, or tend to defeat the purposes for which the corporation was created (*r*), nor where work incidental to such purposes has been done by the agent at the request of the corporation and the corporation has accepted the benefit of such work (*s*).

Thus, it was held that the engagement, by a board of guardians, of a clerk to the master of a workhouse (*t*) or the medical officer of an infirmary (*u*) must be under seal, to bind the board of guardians. Inferior servants, however, may be engaged by parol (*x*). The appointment of a solicitor (*y*) or town clerk (*z*) to a municipal corporation must be under seal or by act of record. Where an attorney was retained by a municipal corporation to oppose a bill in Parliament, it was held that, in the absence of a retainer under seal, he was not entitled to recover his costs (*a*).

*Holding out.*—Where a corporation holds out or permits a person to appear as its agent, it is bound by his acts as such, with respect to persons dealing with him in good faith and without notice of any informality, though he has not been formally appointed. Thus, where an attorney, who had not been appointed under seal, appeared in an action for a corporation to the knowledge of the directors, it was held that the corporation was bound by his acts as its attorney (*b*). So, a company may be bound by the acts of persons acting as directors of the company, though such persons have not been duly appointed directors (*c*).

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(*o*) *South of Ireland Colliery Co.* v. *Waddle* (1869), L. R. 4 C. P. 617 ; 38 L. J. C. P 338, Ex. Ch., affirming L. R. 3 C. P. 463 ; *Henderson* v. *Australian Steam Navigation Co.* (1855), 24 L. J. Q. B. 322 ; 5 El. & Bl. 409. The exception appears also to apply to a municipal corporation in exercise of a statutory power to trade : *Bourne* v. *St. Marylebone Borough Council* (1908), 72 J. P. 129 ; reversed on other grounds, *ibid.*, p. 306. See also *R.* v. *Cumberland JJ.* (1848), 17 L. J. Q. B. 102 ; 5 Dow. & L. 431 (railway company).

(*p*) Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 32 ; Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 97. See also Metropolitan Gas Act, 1860 (23 & 24 Vict. c. 125), s. 20.

(*q*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 35.

(*r*) *Church* v. *Imperial Gaslight Co.* (1838), 7 L. J. Q. B. 118 ; 6 A. & E. 846 ; *Ludlow Corporation* v. *Charlton* (1840), 6 M. & W. 815, 822 ; *Clarke* v. *Cuckfield Union* (1852), 21 L. J. Q. B. 349 ; *Smith* v. *Birmingham, etc., Gas Co.* (1834), 1 A. & E. 526 ; 3 L. J. K. B. 165.

(*s*) *Lawford* v. *Billericay R. D. C.*, [1903] 1 K. B. 772 ; 72 L. J. K. B. 554, C. A. ; *Hodge* v. *Matlock Bath U. D. C.* (1910), 75 J. P. 65, C. A.

(*t*) *Austin* v. *Bethnal Green Guardians* (1874), L. R. 9 C. P. 91 ; 43 L. J. C. P. 100. See also *Cope* v. *Thames Haven Dock, etc., Co.* (1849), 3 Ex. 841.

(*u*) *Dyte* v. *St. Pancras* (1872), 27 L. T. 342.

(*x*) *Horn* v. *Ivy* (1670), 1 Vent. 47 ; *Church* v. *Imperial Gaslight Co.* (1838), 7 L. J. Q. B. 118 ; 6 A. & E. 846 ; *Austin* v. *Bethnal Green Guardians, supra.*

(*y*) *Arnold* v. *Poole Corporation* (1842), 4 M. & G. 860 ; 12 L. J. C. P. 97.

(*z*) *R.* v. *Stamford* (1844), 6 Q. B. 433.

(*a*) *Sutton* v. *Spectacle Makers' Co.* (1864), 10 L. T. 411 ; *Phelps* v. *Upton Snodsbury Highway Board* (1885), 1 T. L. R. 425. Comp. *Hodge* v. *Matlock Bath U. D. C., supra.*

(*b*) *Faviell* v. *Eastern Counties Ry.* (1848), 2 Ex. 344 ; 17 L. J. Ex. 297. And see Article 5, Illustration 14.

(*c*) *Mahoney* v. *East Holyford Mining Co.* (1875), L. R. 7 H. L. 869, H. L.

## SECT. 4.—*Ratification of Unauthorised Acts*

### Article 25

RATIFICATION EQUIVALENT TO PREVIOUS AUTHORITY

Where an act is done in the name or professedly on behalf of a person without his authority by another person purporting to act as his agent, the person in whose name or on whose behalf the act is done may, by ratifying the act, make it as valid and effectual, subject to the provisions of this chapter, as if it had been originally done by his authority, whether the person doing the act was an agent exceeding his authority, or was a person having no authority to act for him at all (*a*).

*Illustrations*

1. A enters into and signs a written contract on behalf of B, without authority. A memorandum of the contract is required by statute to be in writing. B subsequently ratifies the contract. A is deemed to have been B's duly authorised agent to sign the memorandum (*b*).

2. An agent, without authority, insures goods on behalf of his principal. The principal ratifies the policy. The policy is as valid as if the agent had been expressly authorised to insure the goods (*c*).

3. A public agent does an act in excess of his authority. The Crown ratifies the act. The act is deemed to be an act of State (*d*).

### Article 26

WHAT ACTS MAY BE RATIFIED

Every act, whether lawful or unlawful (*e*), which is capable of being done by means of an agent, (except an act which is in its inception void (*f*)), is capable of ratification by the person in whose name or on whose behalf it is done.

*Illustrations*

1. A, on B's behalf, but without his authority, purchases from C a chattel which C has no right to sell, under such circumstances that the purchase of the chattel is a conversion. B ratifies the purchase. B is guilty of converting the chattel (*g*).

(*a*) *Wilson* v. *Tunman* (1843), 6 M. & G. 236 ; *Bird* v. *Brown* (1850), 4 Ex. 786 ; 19 L. J. Ex. 154 ; *Richardson* v. *Oxford* (1861), 2 F. & F. 449 ; *R.* v. *Chapman*, [1918] 2 K. B. 298 ; 87 L. J. K. B. 1142 ; Article 31. See also §§ 82, 83 of the American Restatement.

(*b*) *Maclean* v. *Dunn* (1828), 1 M. & P. 761; *Soames* v. *Spencer* (1822), 1 D. & R. 32.

(*c*) *Wolff* v. *Horncastle* (1798), 1 B. & P. 316 ; *Williams* v. *North China Ass. Co.* (1876), 1 C. P. D. 757, C. A.

(*d*) *Buron* v. *Denman* (1848), 2 Ex. 167 ; *Secretary of State for India* v. *Kamachee Boye Sahaba* (1859), 7 Moo. Ind. App. 476, P. C.

(*e*) Illustrations 1, 2 and 5 ; *Hull* v. *Pickersgill* (1819), 1 Brod. & B. 282 ; *Wilson* v. *Tunman* (1843), 6 M. & G. 236 ; Article 31, Illustration 10.

(*f*) Illustrations 6 and 7 ; *Spackman* v. *Evans* (1868), L. R. 3 H. L. 171, 244, H. L. ; *Banque Jacques Cartier* v. *Banque d'Epargne* (1887), 13 App. Cas. 111 ; 57 L. J. P. C. 42, P. C. See also §§ 84, 85 of the American Restatement.

(*g*) *Hilberry* v. *Hatton* (1864), 33 L. J. Ex. 190 ; 2 H. & C. 822 ; Article 29, Illustration 5.

2. A, an agent of a corporation, assaults B on its behalf. The corporation ratifies the assault. The corporation is civilly liable to B for the assault (*h*).

3. A shipmaster unnecessarily, and without the authority of the owners, sells his ship. The owners may ratify the sale, which then will become valid and binding (*i*).

4. A, a solicitor, at the request of B, the holder of a bill of exchange, sues on the bill in the name of C without C's knowledge or authority. C ratifies the action. A is entitled to recover the amount of the bill (*k*).

5. A distrains B's goods in the name of B's landlord, but without the landlord's authority. The landlord may ratify the distraint, and it is then deemed to have been levied by his authority (*l*).

6. A signs an instrument in B's name without his authority and with intent to defraud. B cannot ratify the signature, because it is a forgery and is void in its inception (*m*). But if B, knowing of the forgery, by his conduct induce a third person to believe that the signature is his, and if such third person act on that belief to his detriment, B will be estopped from denying that it is his signature in any action between him and such third person (*n*), as he will be if, knowing of the forgery, he delays in repudiating the signature, so that the third person thereby loses his right of action against the forger (*o*).

7. The directors of a company enter into a contract which is not within the scope of the memorandum of association. The contract cannot be ratified by the company, even with the assent of every shareholder, because it is *ultra vires*, and therefore void (*p*). So, a payment by the directors of a company, of dividends out of capital, is incapable of ratification by the shareholders (*q*). But a contract entered into on a company's behalf by the directors, which is within the scope of the memorandum, but is beyond the powers of the directors under the articles of association, may be ratified by the company (*r*).

## Article 27

### WHO MAY RATIFY

The only person who has power effectively to ratify an act is the person in whose name or on whose behalf the act was professedly done (*s*), and it is necessary that he should have been in existence (*t*) and capable of being ascertained (*u*) at the time

(*h*) *Eastern Counties Ry.* v. *Broom* (1851), 6 Ex. 314 ; 20 L. J. Ex. 196, Ex. Ch.
(*i*) *The Australia* (1859), 13 Moo. P. C. C. 132.
(*k*) *Ancona* v. *Marks* (1862), 31 L. J. Ex. 163 ; 7 H. & N. 686.
(*l*) *Whitehead* v. *Taylor* (1839), 10 A. & E. 210.
(*m*) *Brook* v. *Hook* (1871), L. R. 6 Ex. 89 ; 40 L. J. Ex. 51 ; *Greenwood* v. *Martins Bank*, [1933] A. C. 51 ; 101 L. J. K. B. 622, H. L. (E.) ; and see *Imperial Bank of Canada* v. *Begley*, [1936] 2 All E. R. 367, P. C.
(*n*) *M'Kenzie* v. *British Linen Co.* (1881), 6 App. Cas. 82, H. L.
(*o*) *Greenwood* v. *Martins Bank*, *supra*.
(*p*) *Ashbury Carriage Co.* v. *Riche* (1875), L. R. 7 H. L. 653 ; 44 L. J. Ex. 185, H. L.
(*q*) *Re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch. D. 519 ; 52 L. J. Ch. 217, C. A.
(*r*) *Irvine* v. *Union Bank of Australia* (1877). 2 App. Cas. 366 ; 46 L. J. P. C. 87 ; *Ashbury Carriage Co.* v. *Riche*, *supra*.
(*s*) Illustrations 1 to 4 ; *Wilson* v. *Barker* (1833), 4 B. & Ad. 614 ; *Royal Albert Hall* v. *Winchelsea* (1891), 7 T. L. R. 362, C. A.
(*t*) See below.
(*u*) *Watson* v. *Swann* (1862), 31 L. J. C. P. 210 ; 11 C. B. (N.S.) 756.

when the act was done ; but it is not necessary that he should be known, either personally or by name, to the person doing the act (*a*).

*The position of company promoters and pre-incorporation contracts of companies.*—The promoters of a prospective company enter into a contract on behalf of the company before its incorporation. The company cannot ratify the contract, because it was not in existence at the time when the contract was made (*b*). The company may, of course, make a new contract on the same terms as the old (*c*), or may incur liability or under the doctrine of part performance (*d*), provided that the contract is not *ultra vires* (*e*), but it cannot ratify the contract. A company is not bound in equity to pay for work done under contracts entered into before its formation, even though the company has adopted the contracts and taken the benefit of them (*f*).

*Infants.*—No action can be brought upon any ratification made after full age of any promise or contract entered into on behalf of an infant, upon which he would not have been liable during infancy. If a new contract is made this can be enforced, the question of what is a new contract has led the Court to introduce subtle refinements (*g*).

*Illustrations*

1. A sheriff, acting under a valid writ of execution, wrongfully seizes goods which are not the property of the debtor. The execution creditor cannot, by becoming a party to an interpleader issue or otherwise, ratify the act of the sheriff so as to render himself liable for the wrongful seizure, because the act was not done by the sheriff on his behalf, but in performance of a public duty (*h*).

2. A enters into an agreement professedly on behalf of B's wife and C. B cannot ratify the agreement so as to give himself a right to sue upon it jointly with his wife and C (*i*).

3. A is authorised to buy wheat on the joint account of himself and B, with a certain limit as to price. A, intending to buy on the joint account of

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(*a*) Illustration 5. See also § 87 of the American Restatement for a similar rule.

(*b*) *Kelner* v. *Baxter* (1886), L. R. 2 C. P. 174 ; 36 L. J. C. P. 94 ; *Re Empress Engineering Co.* (1880), 16 Ch. D. 125, C. A. ; *Re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16, C. A. ; *Re Rotherham Alum and Chemical Co.* (1883), 25 Ch. D. 103 ; 53 L. J. Ch. 290, C. A. ; *Scott* v. *Ebury* (1867), L. R. 2 C. P. 255 ; 36 L. J. C. P. 161 ; *Re Dale and Plant* (1889), 61 L. T. 206 ; *Melhado* v. *Porto Alegre, etc., Ry.* (1874), L. R. 9 C. P. 503 ; 43 L. J. C. P. 253 ; *Star Corn Millers' Co.* v. *Moore* (1886), 2 T. L. R. 751, C. A. ; *North Sydney Investment Co.* v. *Higgins*, [1899] A. C. 263 ; 68 L. J. P. C. 42, P. C. ; *Natal Land, etc., Co.* v. *Pauline, etc., Syndicate*, [1904] A. C. 120 ; 73 L. J. P. C. 22, P. C.

(*c*) *Howard* v. *Patent Ivory Co.* (1888), 38 Ch. D. 156 ; 57 L. J. Ch. 878.

(*d*) *Howard* v. *Patent Ivory Co.* (1888), 38 Ch. D. 156 ; 57 L. J. Ch. 878 ; *Re Dale and Plant* (1889), 61 L. T. 206.

(*e*) *Preston* v. *L. M. & N. Ry.* (1856), 5 H. L. C. 605 ; 25 L. J. Ch. 421 ; *Shrewsbury* v. *N. S. Ry.* (1866), L. R. 1 Eq. 593 ; 35 L. J. Ch. 156.

(*f*) *Re English and Colonial Produce Co.*, [1906] 2 Ch. 435 ; 75 L. J. Ch. 831, C. A.

(*g*) See Infants Relief Act, 1874 (37 & 38 Vict. c. 62), ss. 1, 2. See *Coxhead* v. *Mullis* (1878), 3 C. P. D. 439 ; *Northcote* v. *Doughty* (1879), 4 C. P. D. 385 ; *Ditcham* v. *Worrall* (1880), 5 C. P. D. 410.

(*h*) *Wilson* v. *Tunman* (1843), 6 M. & G. 236 ; *Woollen* v. *Wright*, *Wright* v. *Woollen* (1862), 31 L. J. Ex. 513 ; 1 H. & C. 554, Ex. Ch. ; *Walker* v. *Hunter* (1845), 15 L. J. C. P. 12 ; 2 C. B. 324 ; *Williams* v. *Williams* (1937), 81 S. J. 435.

(*i*) *Saunderson* v. *Griffiths* (1826), 5 B. & C. 909 ; *Heath* v. *Chilton* (1844), 12 M. & W. 632.

himself and B, and expecting that B will ratify the contract, but not disclosing such intention to the seller, enters into a contract in his own name to buy at a price in excess of the limit. . B cannot ratify the contract (*k*).

4. A contracts on behalf of a volunteer corps with B, both parties thinking that the corps as an entity may be bound. The contract cannot be ratified by individual members of the corps, because it was not made on their behalf as individuals (*l*).

5. A effects an insurance on goods on behalf, generally, of every person interested. Any person interested in the goods may subsequently ratify the insurance so far as concerns his interest, and the underwriters will then be bound by the policy to that extent (*m*). So, a person may act on behalf of an heir, or an administrator, or the owner of particular property, whoever he may be, though unascertained and unknown to him, and when ascertained, the person on whose behalf the act was done may ratify it (*n*), provided that he was capable of being ascertained, and was contemplated by the person doing the act at the time when it was done (*o*).

## Article 28

### CIRCUMSTANCES IN WHICH AND WITHIN WHAT TIME RATIFICATION CAN TAKE PLACE

Ratification can only take place in accordance with and subject to the following rules and qualifications :—

(1) Where it is essential to the validity of an act that it should be done within a certain time, the act cannot be ratified after the expiration of that time, to the prejudice of any third person (*p*).

(2) Where an act, not being a contract, would, if it had been previously authorised, have imposed a duty on any third person, the ratification of the act cannot, of itself, impose such duty on such third person, or render him liable as for non-performance or breach thereof (*q*).

(3) Where an act is done which, if not previously authorised nor subsequently ratified by the person on whose behalf it is done, would be a wrongful act on the part of the person doing it, the person on whose behalf it is done, in order by ratification to justify it, must ratify it at a time when he might lawfully do it himself (*r*) ; but the fact that before

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(*k*) *Keighley* v. *Durant*, [1901] A. C. 240 ; 70 L. J. K. B. 622, H. L.

(*l*) *Jones* v. *Hope* (1880), 3 T. L. R. 247, n., C. A.

(*m*) *Hagedorn* v. *Oliverson* (1814), 2 M. & S. 485. But see *Boston Fruit Co.* v. *British and Foreign Marine Ins. Co.*, [1906] A. C. 336 ; 75 L. J. K. B. 537, H. L.

(*n*) *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437 ; 59 L. J. Q. B. 268, H. L. ; *Foster* v. *Bates* (1843), 1 D. & L. 400.

(*o*) *Watson* v. *Swann* (1862), 31 L. J. C. P. 210 ; 11 C. B. (N.S.) 756.

(*p*) Illustrations 1 to 3. *Lord Audley's Case*, Cro. Eliz. 561. See also § 89 of the American Restatement.

(*q*) Illustrations 4 to 6.

(*r*) *Bird* v. *Brown* (1850), 4 Ex. 786 ; 19 L. J. Ex. 154.

the ratification an action for the wrong has been commenced against the person doing the act does not affect the validity of the ratification (*s*).

(4) A payment cannot be ratified after the money paid has been returned to the person who paid it (*t*) ; but the mere fact that the person on whose behalf a payment is made, at first repudiates it, does not prevent him from subsequently ratifying it (*u*).

(5) The ratification of a contract must take place within a reasonable time after the contract is made, and before the time, if any, fixed for the commencement of the performance thereof by the other contracting party, in order to render it binding upon him (*a*). But the mere fact that the person on whose behalf a contract is made refuses, at first, to recognise it (*b*), does not, of itself, affect the validity of a subsequent ratification.

Where an offer is made to an agent, and is accepted by him without authority, the circumstance that the person who made the offer gives notice to the principal of the withdrawal thereof, does not, of itself, prevent the principal from subsequently ratifying the acceptance, and thereby making the contract binding on the person who made the offer (*c*), but where an agent accepts an offer, expressly subject to ratification, the offer may be withdrawn at any time before ratification (*c*).

A contract of marine (*d*), but not of fire (*e*), insurance may be effectively ratified by the owner of the property insured, after the loss of the property, even if he has notice of the loss at the time of the ratification.

*Illustrations*

*Rule* 1

1. A, without the authority of the landlord, gives a tenant notice to quit. The notice cannot be made binding on the tenant by the landlord's ratification after the time for giving notice has expired (*f*).

2. It is agreed between A and B, who are partners, that on the death of either of them the survivor shall have the option of purchasing the share of

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(*s*) Illustration 7. See also §§ 86, 89 of the American Restatement.

(*t*) Illustration 8.

(*u*) *Simpson* v. *Eggington* (1855), 10 Ex. 845 ; 102 R. R. 867. See also *Smith* v. *Cox*, [1940] 2 K. B. 558 ; [1940] 3 All E. R. 546.

(*a*) *Metropolitan Asylum Board* v. *Kingham* (1890), 6 T. L. R. 217.

(*b*) *Soames* v. *Spencer* (1822), 1 D. & R. 32.

(*c*) Illustration 9.

(*d*) *Williams* v. *North China Assurance Co.* (1876), 1 C. P. D. 747, C. A. ; *Cory* v. *Patton* (1874), L. R. 9 Q. B. 577 ; 43 L. J. Q. B. 181.

(*e*) *Grover* v. *Mathews*, [1910] 2 K. B. 401 ; 79 L. J. K. B. 1025.

(*f*) *Doe* d. *Mann* v. *Walter* (1830), 10 B. & C. 626 ; *Doe* d. *Lyster* v. *Goldwin* (1841), 2 Q. B. 143 ; *Right* d. *Fisher* v. *Cuthell* (1804), 5 East 491. *Goodtitle* v. *Woodward* (1819), 3 B. & A. 689, must to this extent be considered overruled.

the deceased upon giving notice to his executors within three months after the death. A dies, and within three months after his death, C, on B's behalf, but without his authority, gives notice to the executors of B's intention to exercise the option. Such notice cannot be ratified after the expiration of the three months so as to bind the executors (*g*).

3. The agent of a consignor of goods, without the authority of his principal, gave notice of stoppage *in transitu* on the principal's behalf. The goods afterwards arrived at their destination, and were formally demanded by the trustee in bankruptcy of the consignee. It was held that the consignor could not subsequently ratify the stoppage *in transitu* and so divest the property in the goods, which had in the meantime vested in the consignee's trustee in bankruptcy (*h*).

*Rule* 2

4. A, being indebted to B, tenders the amount of the debt. Subsequently, C demands the debt in B's name and on his behalf, but without his authority. B cannot ratify the demand so as to defeat A's plea of tender (*i*).

5. A has possession of goods belonging to B. C demands the goods on B's behalf, but without his authority. B cannot ratify the demand so as to entitle him to maintain an action against A for conversion of the goods (*k*).

6. The owner of a ship pledges a policy of insurance thereon. The pledgee, without the authority of the owner, gives notice of abandonment to the underwriters. The owner cannot ratify the notice of abandonment so as to render the underwriters liable as for a constructive total loss (*l*).

*Rule* 3

7. An agent, after the death of his principal, distrained in the principal's name for rent due. Held, that the executor might ratify the distress, and so justify the agent, although an action was at the time of the ratification pending against the agent for the trespass, and although the distress was levied before probate (*m*). So, where an agent, after his principal's death, sold the principal's property professedly on behalf of the estate, it was held that the person who was subsequently granted letters of administration might ratify the sale and recover the price (*n*). The title of an executor arises at, and the title of an administrator relates back to, the time of the death of the deceased.

*Rule* 4

8. A, without B's authority, pays a debt owing by B. The creditor, upon discovering that A was not authorised to pay the debt, returns the money to him. B cannot subsequently ratify, or take advantage of, the payment (*o*).

*Rule* 5

9. A made an offer to B, the managing director of a company, and it was accepted by him on the company's behalf. B had no authority to accept

(*g*) *Dibbins* v. *Dibbins*, [1896] 2 Ch. 348 ; 65 L. J. Ch. 724.
(*h*) *Bird* v. *Brown* (1850), 4 Ex. 786 ; 80 R. R. 775.
(*i*) *Coles* v. *Bell* (1808), 1 Camp. 478, n. ; *Coore* v. *Callaway* (1794), 1 Esp. 115.
(*k*) *Solomons* v. *Dawes* (1794), 1 Esp. 83.
(*l*) *Jardine* v. *Leathley* (1863), 32 L. J. Q. B. 132 ; 3 B. & S. 700.
(*m*) *Whitehead* v. *Taylor* (1839), 10 A. & E. 210.
(*n*) *Foster* v. *Bates* (1843), 12 M. & W. 226 ; 13 L. J. Ex. 88.
(*o*) *Walter* v. *James* (1871), L. R. 6 Ex. 124 ; 40 L. J. Ex. 104.

the offer. A then gave the company notice that he withdrew his offer, and the company subsequently ratified B's unauthorised acceptance. Held, by the Court of Appeal, that the maxim "*omnis ratihabitio retrotrahitur et mandato priori æquiparatur*" applied, and that the ratification dated back to the time of the acceptance, rendering the withdrawal of the offer inoperative. Specific performance decreed against A (*p*). This authority and others were considered to present difficulties by the Judicial Committee of the Privy Council in *Fleming* v. *Bank of New Zealand* (*q*), and the Committee reserved liberty to reconsider them, they have also been weakened by the decision in *Watson* v. *Davies* (*r*). In that case D offered to sell his property to the board of management of a charity. A deputation from the board accepted the offer, but made it clear that they had not full authority to accept, and that it would be necessary for the board to ratify the agreement by resolution. Before the resolution was passed D withdrew his offer, nevertheless the board purported to ratify the act of the deputation. Held, that the deputation did not warrant their authority to bind the board, and that their acceptance was subject to ratification. Further, an acceptance subject to ratification was a nullity until ratification, so that an offer could be withdrawn before acceptance.

## Article 29

### CONDITIONS NECESSARY FOR RATIFICATION

In order that a person may be deemed to ratify an act done without his authority, it is necessary that, at the time of the ratification, he should have full knowledge of all the material circumstances in which the act was done (*s*), unless he intend to ratify the act, and take the risk, whatever the circumstances may have been (*t*). But it is not necessary that he should have knowledge of the legal effect of the act (*u*), or of collateral circumstances affecting the nature thereof (*a*).

*Illustrations*

1. An agent wrongfully distrains certain goods without the authority of the principal, and pays over the proceeds to the principal. The principal is not deemed to have ratified the wrongful distress by receiving the proceeds,

(*p*) *Bolton Partners* v. *Lambert* (1888), 41 Ch. D. 295 ; 58 L. J. Ch. 425, C. A.
(*q*) [1900] A. C. 577, at p. 587 ; 69 L. J. P. C. 120.
(*r*) [1931] 1 Ch. 455 ; 100 L. J. Ch. 87.
(*s*) Illustrations 1 and 2. *Edwards* v. *L. & N. W. Ry.* (1870), L. R. 5 C. P. 445 ; 39 L. J. C. P. 241 ; *Banque Jacques Cartier* v. *Banque D'Epargne* (1887), 13 App. Cas. 111 ; 57 L. J. P. C. 42, P. C. ; *The Bonita, The Charlotte* (1861), 30 L. J. Ad. 145 ; Lush. 252 ; *Gunn* v. *Roberts* (1874), L. R. 9 C. P. 331 ; 43 L. J. C. P. 233 ; *Wall* v. *Cockerell* (1863), 10 H. L. Cas. 229 ; 32 L. J. Ch. 276, H. L. ; *De Bussche* v. *Alt* (1878), 8 Ch. D. 286 ; 47 L. J. Ch. 381, C. A. ; *Imperial Bank of Canada* v. *Begley*, [1936] 2 All E. R. 367, P. C.
(*t*) Illustrations 3 and 4. *Hunter* v. *Parker* (1840), 7 M. & W. 322 ; *Marsh* v. *Joseph*, [1897] 1 Ch. 214 ; 66 L. J. Ch. 128, C. A. ; but see *Midland Bank* v. *Reckitt*, [1933] A. C. 1, at p. 18. "A ratification in advance seems to contradict the essential attributes of ratification as generally understood," *per* Lord Atkin. See also §§ 91, 92 of the American Restatement.
(*u*) *Powell* v. *Smith* (1872), L. R. 14 Eq. 85 ; 41 L. J. Ch. 734.
(*a*) Illustration 5.

unless he received them with a full knowledge of the irregularity, or intended without inquiry to take the risk upon himself (*b*). So, a principal will not be deemed to ratify a voidable transaction unless he knows that it is voidable (*c*).

2. An agent, with authority to distrain for rent, wrongfully seized and sold a fixture, and paid the proceeds to the principal, who received them without notice of the illegality. Held, that the principal had not ratified the trespass (*d*).

3. An agent, without authority, signed a distress warrant, and, after the distress, informed his principal, who said that he should leave the matter in the agent's hands. Held, that this was a ratification of the whole transaction, though there had been irregularities in levying the distress of which the principal had no knowledge (*e*).

4. An agent entered into an agreement on behalf of his principal. A letter from the principal, saying that he did not know what the agent had agreed to, but that he must support him in all he had done, was held to be a sufficient ratification of the agreement, whatever it might be (*f*).

5. An agent purchased a chattel on his principal's behalf from a person who had no right to sell it, and the principal ratified the purchase. Held, that the principal was guilty of a conversion of the chattel, though he had no knowledge at the time of the ratification that the sale was unlawful. Here, the circumstances rendering the transaction a conversion were collateral to and did not form part of the contract ratified (*g*).

## Article 30

### HOW AN ACT MAY BE RATIFIED

The ratification of an act or transaction may be express or implied. A ratification will be implied whenever the conduct of the person, in whose name or on whose behalf the act or transaction is done or entered into, is such as to show that he intends to adopt or recognise such act or transaction in whole or in part (*h*) ; and in the case of an agent exceeding his authority, may be implied from the mere silence or acquiescence of the principal (*i*). The adoption of part of a transaction operates as a ratification of the whole (*k*).

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(*b*) *Lewis* v. *Read* (1845), 14 L. J. Ex. 295 ; 13 M. & W. 834.

(*c*) See *Spackman* v. *Evans* (1868), L. R. 3 H. L. 171 ; *Savery* v. *King* (1856), 5 H. L. Cas. 627 ; 25 L. J. Ch. 482.

(*d*) *Freeman* v. *Rosher* (1849), 13 Q. B. 780 ; 18 L. J. Q. B. 340 ; *Becker* v. *Riebold* (1913), 30 T. L. R. 142.

(*e*) *Haseler* v. *Lemoyne* (1858), 28 L. J. C. P. 103 ; 5 C. B. (N.S.) 530.

(*f*) *Fitzmaurice* v. *Bayley* (1856), 26 L. J. Q. B. 114 ; 6 El. & Bl. 868.

(*g*) *Hilberry* v. *Hatton* (1864), 2 H. & C. 822 ; 33 L. J. Ex. 190.

(*h*) Illustrations 1 to 11. *Benham* v. *Batty* (1865), 12 L. T. 266 ; *Hawley* v. *Sentance* (1863), 7 L. T. 745 ; *Bigg* v. *Strong* (1858), 4 Jur. (N.S.) 983 ; *Clarke* v. *Perrier* (1679), 2 Freem. 48 ; *Keay* v. *Fenwick* (1876), 1 C. P. D. 745, C. A. ; *Smith* v. *Cologan* (1788), 2 T. R. 189.

(*i*) Illustrations 5 and 10. *Prince* v. *Clark* (1823), 1 B. & C. 186 ; 25 R. R. 352 ; *Pott* v. *Bevan* (1844), 1 C. & K. 335 ; *The Australia* (1859), 13 Moo. P. C. C. 132, P. C. ; *Robinson* v. *Gleadow* (1835), 2 Bing. N. C. 156.

(*k*) Illustrations 2 to 4. *Hovil* v. *Pack* (1806), 7 East 164 ; *Ferguson* v. *Carrington* (1829), 9 B. & C. 59 ; *Keay* v. *Fenwick* (1876), 1 C. P. D. 745, C. A. ; *Bristow* v. *Whitmore* (1861), 9 H. L. Cas. 391 ; 31 L. J. Ch. 467, H. L. ; *Frixione* v. *Tagliaferro* (1856), 10 Moo. P. C. C. 175, P. C. ; *Redmell* v. *Eden* (1859), 1 F. & F. 542. See also §§ 93 to 99 of the American Restatement.

It is not necessary that the ratification of a written contract should be in writing, even if the contract be one which is unenforceable unless evidenced by writing (*l*), but the execution of a deed can only be ratified by matter of record or by deed (*m*).

*Ratification by companies.*—An act or transaction done or entered into on behalf of a company may be ratified by the directors, if they have power to do or enter into such an act or transaction on behalf of the company (*n*) ; and a ratification by the directors may be implied from part performance by the company (*n*). Where the act or transaction is beyond the powers of the directors, it can only be effectively ratified by the shareholders (*o*). An act done by the directors in excess of their powers, but within the scope of the memorandum of association, may be ratified by ordinary resolution of the shareholders (*p*) or by an informal meeting of all the shareholders (*q*), and a ratification by the shareholders is implied if they acquiesce in such an act with a knowledge of the circumstances (*r*).

*Illustrations*

1. A shipmaster unnecessarily, and without authority, sells his ship. The owners receive the purchase-money with a full knowledge of the circumstances in which the ship was sold. The receipt of the purchase-money is a ratification of the sale (*s*).

2. A is a bankrupt. B, at the request of A's wife, purchases certain bonds with A's money, and hands them to her. The trustee in bankruptcy seizes some of the bonds as part of A's estate. The trustee in bankruptcy has ratified the act of B, and thereby discharged him from liability (*t*).

3. A is a bankrupt. B wrongfully sells part of A's property. The trustee in bankruptcy accepts the proceeds or part thereof, or otherwise recognises B as his agent in the transaction. B is deemed to have been duly authorised by the trustee to sell the property (*u*).

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(*l*) *Maclean* v. *Dunn* (1828), 1 M. & P. 761 ; *Soames* v. *Spencer* (1822), 1 D. & R. 32.

(*m*) See *Oxford* v. *Crow*, [1893] 3 Ch. 535 ; *Hunter* v. *Parker* (1840), 7 M. & W. 322 ; *Tupper* v. *Foulkes* (1861), 30 L. J. C. P. 214 ; 9 C. B. (N.S.) 797.

(*n*) *Wilson* v. *West Hartlepool, etc., Ry.* (1864), 2 De G. J. & S. 475 ; *Reuter* v. *Electric Telegraph Co.* (1856), 26 L. J. Q. B. 46 ; 6 El. & Bl. 341 ; *Hooper* v. *Kerr* (1901), 23 L. T. 729. Illustration 10.

(*o*) *Spackman* v. *Evans* (1868), L. R. 3 H. L. 171, H. L.

(*p*) *Grant* v. *U. K. Switchback Ry.* (1888), 40 Ch. D. 135, C. A. But see *Boschoek, etc., Co.* v. *Fuke*, [1906] 1 Ch. 148 ; 75 L. J. Ch. 261.

(*q*) *Re Oxted Motor Co.*, [1921] 3 K. B. 32 ; *Re Express Engineering Works, Ltd.*, [1920] 1 Ch. 466, C. A.

(*r*) *London Financial Association* v. *Kelk* (1883), 26 Ch. D. 107 ; *Evans* v. *Smallcombe* (1868), L. R. 3 H. L. 249 ; 37 L. J. Ch. 793, H. L. ; *Re Magdalena Steam Navigation Co.* (1860), 29 L. J. Ch. 667 ; *Maclae* v. *Sutherland* (1854), 23 L. J. Q. B. 229 ; 3 E. & B. 1 ; *Phosphate of Lime Co.* v. *Green* (1871), L. R. 7 C. P. 43 ; *Parker and Cooper, Ltd.* v. *Reading*, [1926] Ch. 975.

(*s*) *The Bonita, The Charlotte* (1861), Lush. 252 ; *Hunter* v. *Parker* (1840), 7 M. & W. 322.

(*t*) *Wilson* v. *Poulter* (1724), 2 Str. 859. See also *Union Bank of Australia* v. *McClintock*, [1922] 1 A. C. 240 ; 91 L. J. P. C. 108, P. C.

(*u*) *Brewer* v. *Sparrow* (1827), 7 B. & C. 310 ; *Lythgoe* v. *Vernon* (1860), 29 L. J. Ex. 164. Comp. *Valpy* v. *Sanders* (1848), 17 L. J. C. P. 249 ; 5 C. B. 887.

4. An agent purchases goods on behalf of his principal at a price exceeding his limit. The principal objects to the contract, but disposes of some of the goods as his own. He is deemed to have ratified the contract, and is bound by it (*a*).

5. A wife purchases goods, which are not necessaries, in the name of her husband. The husband has control over the goods, and does not return them to the seller. He is deemed to ratify the contract, and must pay for the goods (*b*).

6. A employs a broker to execute a distress warrant. The broker, in executing the warrant, illegally seizes goods belonging to B. In answer to a letter from B demanding compensation, A writes that his solicitor will accept service of any process B thinks proper to issue. This reply is evidence of a ratification by A of the wrongful seizure (*c*).

7. A party to a contract which is fraudulent and voidable as against him sues on the contract. He is deemed to ratify the entire contract (*d*). But a principal is not deemed to ratify a contract merely because, after repudiating it, he enters into negotiations for a compromise with the other contracting party (*e*).

8. A debtor whose debt has been paid without his authority pleads the payment in an action by the creditor for the debt. The plea is a sufficient ratification by the debtor of the payment (*f*).

9. A receives the rents of certain property for many years without the authority of the owner. The owner sues A for possession, and for an account of the rents and profits. The action is a sufficient ratification to render A the agent of the owner from the commencement (*g*).

10. The chairman and deputy-chairman of directors, and the secretary, of a manufacturing company, respectively ordered goods which were necessary for the purposes of the business of the company, and the goods were supplied and used therein. Held, that though the goods were ordered without authority the directors must be taken to have known that they had been supplied and used in the business, and that therefore the company was liable for the price (*h*).

11. A contracts to do certain specified repairs to a ship. An agent of the shipowner, whose authority is to the knowledge of A limited to the repairs so specified, sanctions certain variations in the work, and the repairs are executed according to the contract as varied. The shipowner sells the ship as repaired. The sale is not a ratification of the unauthorised variations (*i*).

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(*a*) *Cornwal* v. *Wilson* (1750), 1 Ves. 510.
(*b*) *Waithman* v. *Wakefield* (1807), 1 Camp. 120.
(*c*) *Carter* v. *St. Mary Abbott's Vestry* (1900), 64 J. P. 548, C. A.
(*d*) *Ferguson* v. *Carrington* (1829), 9 B. & C. 59.
(*e*) *Barrett* v. *Irvine*, [1907] 2 Ir. R. 462, C. A.
(*f*) *Belshaw* v. *Bush* (1852), 22 L. J. C. P. 24 ; 11 C. B. 191. See also *Simpson* v. *Eggington* (1855), 10 Ex. 845 ; *Smith* v. *Cox*, [1940] 2 K. B. 558.
(*g*) *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437, H. L.
(*h*) *Smith* v. *Hull Glass Co.* (1852), 21 L. J. C. P. 106 ; 11 C. B. 897 ; 87 R. R. 804 ; *Allard* v. *Bourne* (1863), 15 C. B. (N.S.) 468.
(*i*) *Forman* v. *The Liddesdale*, [1900] A. C. 190 ; 69 L. J. P. C. 44, P. C.

## Article 31

### EFFECT OF RATIFICATION

The effect of ratification is to invest the person on whose behalf the act ratified was done, the person who did the act, and third persons, with the same rights, duties, and liabilities in all respects as if the act had been done with the previous authority of the person on whose behalf it was done (*k*). Provided that no ratification can operate to divest or prejudicially affect any proprietary right vested in any third person at the time of the ratification (*l*). Provided also that the ratification of a contract does not give the person who ratifies it a right of action in respect of any breach thereof committed before the time of the ratification (*m*).

Ratification does not, of itself, give any new authority to the person whose act is ratified (*n*).

*Illustrations*

1. A British naval commander destroyed certain property and released certain slaves belonging to a Spanish subject resident abroad. The foreign and colonial Secretaries of State ratified the act of the commander. Held, that the ratification rendered the act an act of State, for which no action would lie at the suit of the Spanish subject (*o*).

2. A purchases a chattel on behalf of B, under such circumstances that the dealing with the property in the chattel is a conversion. B ratifies the purchase. A and B are jointly and severally liable for the conversion (*p*).

3. A, an agent of a corporation, assaults B, for the supposed benefit of the corporation. The corporation ratifies the assault. It is liable to B in an action for damages (*q*).

4. A, on B's behalf, but without his authority, distrains goods belonging to C. B ratifies the distress. If B had a right to distrain, A is discharged from liability, the ratification having a retroactive effect, and rendering the distress lawful *ab initio* (*r*). If B had no right to distrain, A and B are jointly and severally liable as trespassers (*s*).

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(*k*) See the judgments in *Wilson* v. *Tunman* (1843), 6 M. & G. 236 ; and *Bird* v. *Brown* (1850), 4 Ex. 786 ; Illustrations 1 to 14 ; *Jennings* v. *Moore* (1708), 2 Vern. 609.

(*l*) Illustration 15 ; *Re Gloucester Election Petition, Ford* v. *Newth*, [1901] 1 K. B. 683 ; 70 L. J. K. B. 459.

(*m*) *Kidderminster* v. *Hardwicke* (1873), L. R. 9 Ex. 13 ; 43 L. J. Ex. 9. See also §§ 100 to 104 of the American Restatement.

(*n*) *Irvine* v. *Union Bank of Australia* (1877), 2 App. Cas. 366 ; 46 L. J. P. C. 87, P. C. A ratification may be conditional : *Holt* v. *Brien* (1821), 4 B. & Ald. 252.

(*o*) *Buron* v. *Denman* (1848), 2 Ex. 167. See also *Secretary of State for India* v. *Kamachee Boye Sahaba* (1859), 13 Moo. P. C. 22, P. C.

(*p*) *Hilberry* v. *Hatton* (1864), 2 H. & C. 822 ; 33 L. J. Ex. 190 ; and see *Irving* v. *Motly* (1831), 7 Bing. 543.

(*q*) *Eastern Counties Ry.* v. *Broom* (1851), 6 Ex. 314 ; 20 L. J. Ex. 196, Ex. Ch.

(*r*) *Whitehead* v. *Taylor* (1839), 10 A. & E. 210 ; *Hull* v. *Pickersgill* (1819), 1 Brod. & B. 282.

(*s*) See *Bird* v. *Brown* (1850), 4 Ex. 786.

5. A makes a contract on behalf of B without his authority. B ratifies the contract. B is liable on the contract, and A is discharged from liability unless he contracted personally (*t*).

6. An agent does an act in excess of his authority. The principal ratifies the act. The agent is not liable to the principal for having exceeded his authority (*u*).

7. A converts the property of a bankrupt by selling or disposing of it without the authority of the trustee in bankruptcy. The trustee ratifies the sale or disposition by receiving the proceeds or otherwise. A is discharged from liability in respect of the conversion (*a*).

8. A factor contracts to purchase goods on his principal's behalf at a price exceeding his limit. The principal ratifies the contract. He must pay the factor the full price (*b*).

9. The relatives of a deceased person order an extravagant funeral. If the executor or administrator ratifies the order, he is personally liable for the whole expense (*c*).

10. The secretary of a company, without the authority of the directors, sends out a notice purporting to have been issued by order of the board, convening an extraordinary general meeting, a requisition for such meeting having been duly served on the company in accordance with the articles of association. At a board meeting held two days before the date for which the general meeting is called, the directors resolve to ratify and confirm the issuing of the notice by the secretary. The notice is thereby rendered valid, and the meeting is duly summoned (*d*).

11. A insures goods, in which he has no insurable interest, on behalf of B. B, who has an insurable interest in the goods, ratifies the insurance. The insurable interest of B is sufficient to support an action by A on the policy (*e*).

12. The managing owner of a ship sells her through his agent. His co-owners ratify the sale. The owners are jointly liable to the agent for his commission (*f*). So, if a principal ratify the act of a sub-agent, he is liable to the sub-agent for his commission (*g*).

13. A shipmaster entered into contracts with the Admiralty for the transport of troops, and paid and incurred various sums and liabilities to enable him to perform the contracts, the shipowner being bankrupt, and having mortgaged the vessel. Held, that the master had a right to be repaid

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(*t*) *Spittle* v. *Lavender* (1821), 5 Moore 270 ; *Koenigsblatt* v. *Sweet*, [1923] 2 Ch. 314, C. A.

(*u*) *Clarke* v. *Perrier* (1679), 2 Freem. 48 ; *Smith* v. *Cologan* (1788), 2 T. R. 189 ; *Cornwal* v. *Wilson* (1750), 1 Ves. 510 ; *Risbourg* v. *Bruckner* (1858), 27 L. J. C. P. 90 ; 3 C. B. (N.S.) 812.

(*a*) *Brewer* v. *Sparrow* (1827), 7 B. & C. 310 ; *Wilson* v. *Poulter* (1724), 2 Str. 859 ; *Smith* v. *Baker* (1873), L. R. 8 C. P. 350 ; 42 L. J. C. P. 155 ; *Lythgoe* v. *Vernon* (1860), 29 L. J. Ex. 164.

(*b*) *Cornwal* v. *Wilson* (1750), 1 Ves. 510.

(*c*) *Brice* v. *Wilson* (1838), 8 A. & E. 349 ; *Lucy* v. *Walrond* (1837), 3 Bing. N. C. 841.

(*d*) *Hooper* v. *Kerr* (1901), 83 L. T. 729.

(*e*) *Wolff* v. *Horncastle* (1798), 1 B. & P. 316.

(*f*) *Keay* v. *Fenwick* (1876), 1 C. P. D. 745, C. A.

(*g*) *Mason* v. *Clifton* (1863), 3 F. & F. 899.

the expenses and indemnified against the liabilities, out of the freight due from the Admiralty, the assignees in bankruptcy and mortgagees not being entitled to take the benefit of the contract, unless they also adopted the burdens connected therewith (*h*).

14. An agent defends an action brought against him for breach of a contract entered into by him on behalf of his principal. The principal ratifies what he has done. The principal must indemnify the agent against the damages and costs recovered by the plaintiff in the action (*i*). So, where a person is made a party to an action without his authority, he cannot avail himself of the benefit of the action, unless he pays the costs of conducting it (*k*).

15. A commodore in the navy, without authority to do so, appointed a captain. Held, that even if the Crown ratified the appointment, that would not give the commodore the right to share as a commodore with a captain under him, in prizes taken before the date of the ratification, because the rights to the various shares in those prizes would then be already vested (*l*).

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(*h*) *Bristow* v. *Whitmore* (1861), 9 H. L. Cas. 391 ; 31 L. J. Ch. 467.
(*i*) *Frixione* v. *Tagliaferro* (1856), 10 Moo. P. C. C. 175, P. C. ; and see *Gleadow* v. *Hull Glass Co.* (1849), 19 L. J. Ch. 44.
(*k*) *Hall* v. *Laver* (1842), 1 Hare 571 ; 58 R. R. 198.
(*l*) *Donelly* v. *Popham* (1807), 1 Taunt. 1 ; 9 R. R. 687.

# CHAPTER III

## AUTHORITY OF AGENTS

THE authority of an agent may be express or implied. Its nature and extent may be defined by a power of attorney, a formal instrument under seal, by writing not under seal, or by verbal instructions, or may be inferred from a course of dealing between the parties (*a*). Authority may be implied from the situation of the parties, the circumstances of the particular case, the usage of trade or business, or the conduct of the principal. The interpretation of authority, both express and implied, is fully discussed in §§ 32 to 81 of the American Restatement. The Restatement deals with particular authorisations, *e.g.*, to borrow, to lease, to receive payment, whereas this chapter usually deals with the authority of particular agents.

### Article 32

AUTHORITY CANNOT EXCEED POWERS OF PRINCIPAL

The authority, whether express or implied, of every agent is confined within the limits of the powers of his principal (*b*).

Thus, an agent of a corporation or incorporated company cannot have any authority, express or implied, to do any act on behalf of the corporation or company which is *ultra vires* (*b*).

### Article 33

CONSTRUCTION OF AUTHORITY GIVEN IN GENERAL TERMS

Authority conferred in general terms is construed as authority to act only in the usual way, and according to the ordinary course of business.

In particular, an agent who is authorised to receive payment of money has, *prima facie*, no authority to receive payment otherwise than in cash, unless it be usual or customary in the particular business to receive payment in some other form, and such usage or custom be reasonable or known to the principal at the time when he confers the authority (*c*). Where, however, the debtor to the principal is financially embarrassed, the agent's duty is to do his best to collect all that he can in the circumstances (*d*).

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(*a*) *Pole* v. *Leask* (1860), 28 Beav. 562 ; 29 L. J. Ch. 888.

(*b*) *Shrewsbury, etc., Ry.* v. *L. & N. W. Ry.* (1857), 6 H. L. Cas. 113, H. L. ; *Montreal Assurance Co.* v. *M'Gillivray* (1859), 13 Moo. P. C. C. 87, P. C. ; *Poulton* v. *S. W. Ry.* (1867), L. R. 2 Q. B. 534 ; 36 L. J. Q. B. 294 ; *Ashbury Railway Carriage Co.* v. *Riche* (1875), L. R. 7 H. L. 653 ; 44 L. J. Ex. 185, H. L.

(*c*) Illustrations 4 to 7, and see Article 40, and Article 100, Illustrations 12 to 15.

(*d*) *Gokal Chand-Jagan Nath* v. *Nand Ram Das-Atma Ram*, [1939] A. C. 106 ; 108 L. J. P. C. 9, P. C.

*Authority to receive payment of money.*—A is authorised to receive payment of money. He has no authority—(1) to receive payment before the money is due, and if his authority be revoked before that time, the debtor is not discharged by such a payment (*e*) ; (2) to receive payment by cheque (*f*) unless in the particular business in which he is employed it is usual so to receive payment (*g*) ; the burden of proving any such custom lies on the person who seeks to establish the authority (*f*) ; but a cheque payable to the agent's order which is honoured on presentation is equivalent to cash (*h*) ; or (3) to receive payment by way of set-off or settlement of accounts between himself and the debtor (*i*). Apart from custom or usage, the agent's authority may not be limited to receiving cash or to giving up some valuable thing or right in return only for cash, so that in such a case it is his duty to do his best to obtain cash, and he will only be liable if the principal can prove that the agent has failed in this duty (*d*).

*Illustrations*

1. A stockbroker is authorised to sell stock or shares. He has no authority to sell on credit, because it is not usual to sell stock or shares on credit (*k*).

2. A is authorised to sell and warrant certain goods. He cannot bind his principal by a warranty given at any other time than at the sale of the goods (*l*).

3. On the dissolution of a partnership, authority is given to one of the partners by his co-partners—(1) to settle the partnership affairs (*m*), or (2) to receive all debts owing to, and to pay all debts owing by, the firm (*n*). In neither case has he authority to draw, accept, or indorse bills of exchange in the name of the firm.

*Authority to receive payment of money*

4. It is provided by the conditions of a sale by auction that the purchase-money for the goods sold shall be paid to the auctioneer. The auctioneer has no authority to receive a bill of exchange in payment, and if his authority to receive payment be revoked during the currency of the bill, such a payment does not discharge the purchaser (*o*). So, an insurance broker has no authority

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(*e*) *Breming* v. *Mackie* (1862), 3 F. & F. 197.

(*f*) *Papè* v. *Westacott*, [1894] 1 Q. B. 272 ; 63 L. J. Q. B. 222, C. A. ; *Blumberg* v. *Life Interests, etc., Corporation*, [1897] 1 Ch. 171 ; [1898] 1 Ch. 27 ; 66 L. J. Ch. 127, C. A.

(*g*) *Bridges* v. *Garrett* (1870), L. R. 5 C. P. 451 ; 39 L. J. C. P. 251, Ex. Ch. ; *Walker* v. *Barker* (1900), 16 T. L. R. 393.

(*h*) *Bradford* v. *Price* (1923), 92 L. J. K. B. 871 ; *Clay Hill Brick and Tile Co. Ltd.* v. *Rawlings*, [1938] 4 All E. R. 100.

(*i*) *Underwood* v. *Nicholls* (1885), 25 L. J. C. P. 79 ; 17 C. B. 239 ; *Sweeting* v. *Pearce* (1859), 29 L. J. C. P. 266 ; 7 C. B. (N.S.) 449 ; *Coupé* v. *Collyer* (1890), 62 L. T. 927 ; *Wrout* v. *Dawes* (1858), 27 L. J. Ch. 635 ; 25 Beav. 369 ; *Legge* v. *Byas* (1902), 7 Com. Cas. 16. See also Illustration 7 and cases there cited. See also on this subject §§ 71, 72 of the American Restatement.

(*k*) *Wiltshire* v. *Sims* (1808), 1 Camp. 258.

(*l*) *Helyear* v. *Hawke* (1803), 5 Esp. 72.

(*m*) *Abel* v. *Sutton* (1800), 3 Esp. 108. See also *Odell* v. *Cormack* (1887), 19 Q. B. D. 223. Cp. *Smith* v. *Winter* (1838), 4 M. & W. 454 ; 8 L. J. Ex. 34.

(*n*) *Kilgour* v. *Finlyson* (1789), 1 H. Bl. 156.

(*o*) *Williams* v. *Evans* (1866), L. R. 1 Q. B. 352 ; 35 L. J. Q. B. 111 ; *Sykes* v. *Giles* (1839), 5 M. & W. 645 ; 9 L. J. Ex. 106.

to take a bill of exchange in payment of a claim, of which he is authorised to receive payment (*p*).

5. An agent is authorised to receive payment of an account, and to retain part of the amount in discharge of a debt due to him from the principal. He has authority to the extent of his debt, to settle in his own way with the debtor of his principal (*q*).

6. A authorises B, a stockbroker, to receive money due from C, also a stockbroker. B has no authority to settle with C by way of set-off (*r*).

7. A authorises B, an insurance broker, to receive the amount due under a policy of insurance from the underwriters. The underwriters in good faith settle with B by setting off a debt due to them from him, and their names are struck out of the policy. By a custom at Lloyd's, a set-off is considered equivalent to payment as between broker and underwriter. If A were aware of the custom when he authorised B to receive payment, he is bound by the settlement. Otherwise he is not bound, because the custom is unreasonable (*s*).

## Article 34

### AUTHORITY GIVEN IN AMBIGUOUS TERMS

Where the authority of an agent is conferred in such ambiguous terms, or the instructions given to him are so uncertain, as to be fairly capable of more than one construction, every act done by him in good faith, which is warranted by any one of those constructions, is deemed to have been duly authorised, though the construction adopted and acted upon by him was not the one intended by the principal (*t*).

*Illustrations*

1. An agent was instructed to sell goods at such a price as would realise 15s. per ton, net cash. He sold them at 15s. 6d. per ton, subject to two months' credit. Held, that the instructions might fairly be construed as meaning either 15s. net cash, such a price as would eventually realise 15s. after allowing for interest, or a *del credere* commission ; and that the sale at 15s. 6d., two months, was within the authority (*u*).

2. A commission agent was authorised to buy and ship 500 tons of sugar (subject to a certain limit in price, to cover cost, freight, and insurance), 50

(*p*) *Hine* v. *S. S. Ins. Syndicate* (1895), 72 L. T. 79, C. A.

(*q*) *Barker* v. *Greenwood* (1836), 6 L. J. Ex. Eq. 54 ; 2 Y. & C. 414 ; 47 R. R. 431.

(*r*) *Pearson* v. *Scott* (1878), 9 Ch. D. 198 ; 47 L. J. Ch. 705 ; *Blackburn* v. *Mason* (1893), 68 L. T. 510, C. A. ; *Anderson* v. *Sutherland* (1897), 13 T. L. R. 163.

(*s*) *Sweeting* v. *Pearce* (1859), 7 C. B. (N.S.) 449 ; 29 L. J. C. P. 266 ; *Todd* v. *Reid* (1821), 4 B. & Ald. 210 ; *Bartlett* v. *Pentland* (1830), 10 B. & C. 760 ; *Stewart* v. *Aberdein* (1838), 4 M. & W. 211 ; 51 R. R. 536 ; *Scott* v. *Irving* (1830), 1 B. & Ad. 605 ; *Matvieff* v. *Crosfield* (1903), 51 W. R. 365. See also § 44 of the American Restatement.

(*t*) *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395 ; 41 L. J. Q. B. 201, H. L. ; *Loring* v. *Davis* (1886), 32 Ch. D. 625 ; 55 L. J. Ch. 725 ; *Johnston* v. *Kershaw* (1867), L. R. 2 Ex. 82 ; 36 L. J. Ex. 44 ; *Weigall* v. *Runciman* (1916), 85 L. J. K. B. 1187, C. A. ; *Gould* v. *S. E. & C. Ry.*, [1920] 2 K. B. 186 ; 89 L. J. K. B. 700 ; and see Illustrations.

(*u*) *Boden* v. *French* (1851), 10 C. B. 886.

tons more or less of no moment, if it enabled him to secure a suitable vessel. Held, that a shipment of 400 tons was a good execution of the authority (*a*).

3. An agent undertook to sell and transfer certain stock when the funds should be at 85 or over. Held, that he was bound to sell when the funds reached 85, and had no discretion to wait until they went higher than that price (*b*).

## Article 35

### CONSTRUCTION OF POWERS OF ATTORNEY

Powers of attorney must be strictly pursued, and are construed as giving only such authority as they confer expressly or by necessary implication (*c*). The following are the most important rules of construction—

(1) The operative part of the deed is controlled by the recitals where there is ambiguity (*d*).

(2) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts (*e*).

(3) General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers only when necessary for that purpose (*f*).

(4) The deed must be construed so as to include all incidental powers necessary for its effective execution (*g*).

A clause in a power of attorney, whereby the principal agrees to ratify and confirm whatsoever the attorney shall do or purport to do by virtue of the power, does not extend the authority given by the power (*h*).

*Illustrations*

*Rule* 1

1. A power of attorney recited that the principal was going abroad, and the operative part gave authority in general terms. Held, that the authority subsisted only during the principal's absence abroad (*i*). A power of attorney

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(*a*) *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395 ; 41 L. J. Q. B. 201, H. L.

(*b*) *Bertram* v. *Godfray* (1830), 1 Knapp 381, P. C.

(*c*) *Bryant* v. *La Banque du Peuple*, [1893] A. C. 170 ; 62 L. J. P. C. 68, P. C. ; *Jonmenjoy Coondoo* v. *Watson* (1884), 9 App. Cas. 561 ; 53 L. J. P. C. 80, P. C. ; *Jenkins* v. *Gould* (1827), 3 Russ. 385 ; and see Illustrations. As to execution of deeds under powers of attorney, see p. 75, *post*.

(*d*) Illustration 1.

(*e*) Illustrations 2 and 3 ; *Perry* v. *Holl* (1860), 29 L. J. Ch. 677 ; 2 De G. F. & J. 38.

(*f*) *Lewis* v. *Ramsdale* (1836), 55 L. T. 179 ; *Attwood* v. *Munnings* (1827), 7 B. & C. 278 ; *Re Bowles* (1874), 31 L. T. 365 ; *Harper* v. *Godsell* (1870), L. R. 5 Q. B. 422 ; 39 L. J. Q. B. 185 ; *Bryant* v. *La Banque du Peuple*, [1893] A. C. 170 ; 62 L. J. P. C. 68, P. C.

(*g*) Illustrations 8 and 9 ; *Withington* v. *Herring* (1829), 5 Bing. 442 ; *Howard* v. *Baillie* (1796), 2 H. Bl. 618 ; *Willis* v. *Palmer* (1860), 29 L. J. C. P. 194 ; 7 C. B. (N.S.) 340 ; *Routh* v. *Macmillan* (1863), 33 L. J. Ex. 38 ; 2 H. & C. 750.

(*h*) *Midland Bank* v. *Reckitt*, [1933] A. C. 1 ; 102 L. J. K. B. 297.

(*i*) *Danby* v. *Coutts* (1885), 29 Ch. D. 500 ; 54 L. J. Ch. 577.

to manage the principal's affairs while he is abroad, amplified by a letter from the principal to his bankers stating that he wished the power to cover the drawing of cheques upon the bank without restriction, does not authorise the attorney to draw cheques in payment of his own private debts (*k*).

*Rule* 2

2. Power was given " to demand and receive all moneys due to the principal on any account whatsoever, and to use all means for the recovery thereof, to appoint attorneys to bring actions, and to revoke such appointments, and to do all other business." Held, that " all other business " must be construed to mean all other business necessary for the recovery of the moneys, or in connection therewith ; and that the power of attorney gave the agent no authority to indorse a bill of exchange received by him thereunder (*l*).

3. A, who carried on business in Australia, gave an agent in England a power of attorney to purchase goods in connection with the business, either for cash or on credit, and where necessary in connection with any such purchases, or in connection with the business, to make, draw, sign, accept or indorse for him and on his behalf any bills of exchange or promissory notes which should be requisite or proper. It was held that the power of attorney gave no power to borrow money, and the agent, purporting to act in pursuance of the power, having given bills of exchange in respect of a loan, and misapplied the money, that A was not liable on the bills (*m*).

*Rule* 3

4. A power of attorney " to recover and receive all sums of money owing . . . by virtue of any security . . . and to give, sign, and execute receipts, releases, or other discharges for the same, . . . and to sell any real or personal property . . . belonging " to the principal, does not authorise the agent to exercise the statutory power of sale of real property vested in the principal as a mortgagee (*n*). A power of attorney giving " sole and absolute control of all my property . . . whether owned by me solely or jointly with any other person or persons " applies only to property in beneficial ownership and not to property held on trust for sale (*o*).

5. A resident director and manager of a mining company was authorised by deed " to direct the mine so as most effectually to promote the interests of the company, to employ workmen, provide needful implements, etc., but not to engage the credit of the company for more than £50 without the express authority in writing of the managing directors." Held, that he had no authority to bind the company by accepting bills of exchange (*p*).

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(*k*) *Reckitt* v. *Barnett*, [1929] A. C. 176 ; 98 L. J. K. B. 136, H. L. ; *Midland Bank* v. *Reckitt*, *supra*.

(*l*) *Hogg* v. *Snaith* (1808), 1 Taunt. 347 ; *Hay* v. *Goldsmidt* (1804), 1 Taunt. 349 ; *Esdaile* v. *La Nauze* (1835), 4 L. J. Ex. Eq. 46 ; 1 Y. & C. 394 ; *Murray* v. *East India Co.* (1821), 5 B. & A. 204.

(*m*) *Jacobs* v. *Morris*, [1902] 1 Ch. 816 ; 71 L. J. Ch. 363, C. A.

(*n*) *Re Dowson and Jenkins' Contract*, [1904] 2 Ch. 219 ; 73 L. J. Ch. 684, C. A.

(*o*) *Green* v. *Whitehead*, [1930] 1 Ch. 38 ; 99 L. J. Ch. 153, C. A.

(*p*) *Brown* v. *Byers* (1847), 16 L. J. Ex. 112 ; 16 M. & W. 252. And see *Smith* v. *Prosser*, [1907] 2 K. B. 735 ; 77 L. J. K. B. 71, C. A.

6. An executor gave a power of attorney to transact in his name all the affairs of the testator. Held, that the agent had no authority to accept a bill of exchange in the name of the executor so as to bind him personally (*q*).

7. A power of attorney " from time to time to negotiate, make sale, dispose of, assign and transfer," gives no authority to pledge (*r*). But a power " to sell, indorse and assign," authorises an indorsement to a bank as security for a loan to the agent ; such a power being construed as giving (1) authority to sell, (2) authority to indorse, and (3) authority to assign (*s*).

*Rule* 4

8. A partner gave his son a power of attorney " to act on his behalf in dissolving the partnership, with authority to appoint any other person as he might see fit." Held, that this gave the son power to submit the partnership accounts to arbitration (*t*).

9. A power of attorney " to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings touching anything in which the principal or his ships or other personal estate may be in anywise concerned," authorises the attorney to sign on behalf of the principal a bankruptcy petition against a debtor of the principal (*u*).

## Article 36

CONSTRUCTION OF AUTHORITY NOT GIVEN UNDER SEAL

Where the authority of an agent is given by an instrument not under seal, or is given verbally, it is construed liberally, having due regard to the object of the authority and to the usages of trade or business (*a*).

*IMPLIED AUTHORITY*

## Article 37

TO DO WHAT IS NECESSARY FOR, OR INCIDENTAL TO, EFFECTIVE EXECUTION OF EXPRESS AUTHORITY

Every agent has implied authority to do whatever is necessary for, or ordinarily incidental to, the effective execution of his express authority in the usual way (*b*).

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(*q*) *Gardner* v. *Baillie* (1796), 6 T. R. 591 (*Howard* v. *Baillie* (1796), 2 H. Bl. 618 ; 3 R. R. 531, was decided on the ground of ratification).

(*r*) *Jonmenjoy Coondoo* v. *Watson* (1884), 9 App. Cas. 561 ; 53 L. J. P. C. 80, P. C. ; *De Bouchout* v. *Goldsmid* (1800), 5 Ves. 211.

(*s*) *Bank of Bengal* v. *Macleod* (1849), 5 Moo. Ind. App. 1 ; *Bank of Bengal* v. *Fagan* (1849), 5 Moo. Ind. App. 27, P. C.

(*t*) *Henley* v. *Soper* (1828), 8 B. & C. 16.

(*u*) *Re Wallace, ex p. Richards* (1884), 14 Q. B. D. 22 ; 54 L. J. Q. B. 293, C. A.

(*a*) *Pole* v. *Leask* (1860), 28 Beav. 562 ; 29 L. J. Ch. 888 ; *Entwistle* v. *Dent* (1848), 1 Ex. 812 ; 18 L. J. Ex. 138 ; *Pariente* v. *Lubbock* (1855), 20 Beav. 588 ; *Gillow* v. *Aberdare* (1893), 9 T. L. R. 12, C. A. ; *Re Williams, Ex p. Howell* (1865), 12 L. T. 785 ; *Re Frampton* (1859), 1 De G. F. & J. 263; *Tallentire* v. *Ayre* (1884), 1 T. L. R. 143, C. A.

(*b*) *Beaufort* v. *Neeld* (1845), 12 C. & F. 248, H. L. ; *Pole* v. *Leask*, *supra* ; *Dingle* v. *Hare* (1859), 7 C. B. (N.S.) 145 ; 29 L. J. C. P. 143 ; *Capel* v. *Thornton* (1828), 3 C. & P. 352 ; and see Illustrations. For a case in which the question arose whether a servant had implied authority to accept help in difficulties, see *Lomas* v. *Jones*, [1944] 1 K. B. 4, C. A., *per* du Parcq, L.J.

The positions of general and special agents must be distinguished. A third party dealing with a general agent is entitled to assume that he possesses general powers, but when dealing with a special agent the third party must ascertain the extent of his authority. The old cases concerning the sale of horses are a good example of this. A keeper of a livery stable, or other person who is accustomed to buying or selling horses, authorises his servant to sell a horse privately, but does not authorise him to warrant the horse. Nevertheless, the servant has implied authority to warrant the horse (*c*). Similarly, where the servant of a private owner is authorised to sell a horse at a fair or public market-place, the servant has implied authority to warrant the horse ; it is customary for the person selling at a fair or market-place to have the full authority of the owner (*d*). But the servant of a private person authorised to sell a horse privately (*e*), or to deliver one (*f*) has not implied authority to warrant it.

*Illustrations*

1. A is authorised to enter into a binding contract. He has implied authority to sign a memorandum thereof to satisfy the Statute of Frauds, the Sale of Goods Act, 1893, or the Law of Property Act, 1925 (*g*).

But it must be a memorandum of the contract authorised ; and where solicitors acting upon instructions, bid for three separate lots of property at an auction and the property was knocked down to them, it was held that they had no authority to sign one indivisible agreement to purchase all the lots (*h*).

2. A is authorised to buy certain railway shares. He has implied authority to do everything in the usual course of business necessary to complete the bargain (*i*).

3. A is employed to get a bill of exchange discounted. He has implied authority to warrant it a good bill, but not to indorse it in the name of the principal (*k*).

4. A is authorised to receive and sell certain goods, and to pay himself a debt out of the proceeds. He has implied authority to bring an action against a third person wrongfully withholding possession of the goods (*l*).

5. An agent is employed to find a purchaser for certain property. He has implied authority to describe the property, and state to an intending purchaser any facts or circumstances which may affect its value (*m*).

6. An agent is authorised to receive certain rents for his own benefit. He has no implied authority to distrain for the rents (*n*).

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(*c*) *Howard* v. *Sheward* (1866), L. R. 2 C. P. 148 ; 36 L. J. C. P. 42 ; *Bank of Scotland* v. *Watson* (1813), 1 Dow. 45 ; 14 R. R. 11, H. L. ; *Baldry* v. *Bates* (1885), 52 L. T. 620.

(*d*) *Brooks* v. *Hassall* (1883), 49 L. T. 569.

(*e*) *Brady* v. *Todd* (1861), 9 C. B. (N.S.) 592 ; 30 L. J. P. C. 223, overruling *Alexander* v. *Gibson* (1811), 2 Camp. 555.

(*f*) *Woodin* v. *Burford* (1834), 3 L. J. Ex. 75 ; 2 C. & M. 391.

(*g*) *Durrell* v. *Evans* (1862), 1 H. & C. 174 ; 31 L. J. Ex. 337 ; *Wallace* v. *Roe*, [1903] 1 Ir. R. 32 ; *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267 ; 69 L. J. Ch. 569.

(*h*) *Smith* v. *MacGowan*, 159 L. T. 278 ; [1938] 3 All E. R. 447.

(*i*) *Bayley* v. *Wilkins* (1849), 18 L. J. C. P. 273 ; 7 C. B. 886 ; 78 R. R. 849.

(*k*) *Fenn* v. *Harrison* (1791), 3 T. R. 757 ; 4 T. R. 177.

(*l*) *Curtis* v. *Barclay* (1826), 5 B. & C. 141.

(*m*) *Mullens* v. *Miller* (1882), 22 Ch. D. 194 ; 52 L. J. Ch. 380.

(*n*) *Ward* v. *Shew* (1833), 2 L. J. C. P. 58 ; 9 Bing. 608.

7. An agent is employed to find a purchaser and to contract for the sale of an estate. He has no implied authority to receive the purchase-money (*o*).

8. An agent is employed to obtain payment of a bill of exchange from the acceptor. He has no implied authority to receive payment subject to a condition that the acceptor shall not be liable for the expenses of protesting the bill for non-payment (*p*).

## Article 38

### IMPLIED AUTHORITY OF GENERAL AGENTS

Every agent who is authorised to conduct a particular trade or business, or generally to act for his principal in matters of a particular nature, or to do a particular class of acts, has implied authority to do whatever is incidental to the ordinary conduct of such a trade or business (*q*), or of matters of that nature, or is within the scope of that class of acts (*r*), and whatever is necessary for the proper and effective performance of his duties (*s*) ; but not to do anything that is outside the ordinary scope of his employment and duties (*t*).

The principle stated in *Watteau* v. *Fenwick* (*u*) is that " the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character," further secret limitations placed upon the agent's authority by the principal do not prevail against a third party. This doctrine could not, it was said, be limited to cases where there had been a holding out of authority, since it would apply where the third party was ignorant of the existence of the principal. The decision was followed in *Kinahan* v. *Parry* (*a*), but has been much criticised (*b*).

*Illustrations*

1. A is the manager of an estate. He has implied authority to contract for the usual and customary leases (*c*), and to give and receive notices to quit to and from the tenants (*d*) ; and to enter into agreements with tenants

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(*o*) *Mynn* v. *Joliffe* (1834), 1 M. & Rob. 326.

(*p*) *Bank of Scotland* v. *Dominion Bank*, [1891] A. C. 592, H. L. Sc.

(*q*) Illustrations 1 to 7.

(*r*) Illustrations 9 to 11; *Re Williams, ex p. Howell* (1865), 12 L. T. 785; *Peers* v. *Sneyd* (1853), 17 Beav. 151 ; 99 R. R. 78 ; *Jones* v. *Phipps* (1868), L. R. 3 Q. B. 567 ; 37 L. J. Q. B. 198 ; *Webber* v. *Granville* (1860), 30 L. J. C. P. 92. For implied authority of shipmasters, see *post*, pp. 65 to 68.

(*s*) Illustrations 10 and 15 to 18; *Langan* v. *G. W. Ry.* (1874), 30 L. T. 173; 26 L. T. 577, Ex. Ch.

(*t*) *Linford* v. *Provincial, etc., Ins. Co.* (1864), 34 Beav. 291 ; *Cox* v. *Midland Ry.* (1849), 3 Ex. 268 ; 77 R. R. 623 ; *Kreditbank Cassel* v. *Schenkers*, [1927] 1 K. B. 826 ; 96 L. J. K. B. 501, C. A. Illustrations 2 and 11 to 18.

(*u*) [1893] 1 Q. B. 346.

(*a*) [1910] 2 K. B. 389, reversed by the Court of Appeal on the ground that there was no evidence of agency, [1911] 1 K. B. 459 ; 80 L. J. K. B. 276, C. A.

(*b*) See *Miles* v. *McIlwraith* (1883), 8 App. Cas. 120 ; Lindley on Partnership (10th ed.), p. 174, and 17 Canadian Bar Review 693. See also §§ 40, 161, 194, 195 of the American Restatement.

(*c*) *Peers* v. *Sneyd* (1853), 17 Beav. 151.

(*d*) *Papillon* v. *Brunton* (1860), 29 L. J. Ex. 265 ; 5 H. & N. 518 ; 120 R. R. 704 ; *Jones* v. *Phipps* (1868), L. R. 3 Q. B. 567 ; 37 L. J. Q. B. 198.

authorising them to change the mode of cultivation, and providing for the basis on which compensation for improvements shall be payable on the determination of the tenancy (*e*).

2. A is the managing owner (ship's husband) of a ship. He has implied authority to pledge the credit of his co-owners for all such things, including repairs, as are necessary for the usual or suitable employment of the ship (*f*). But he has no implied authority, as managing owner, to insure the vessel on behalf of his co-owners (*g*), or to agree to pay a sum of money for the cancellation of a charterparty made by him on their behalf (*h*).

3. The manager and licensee of a beerhouse carries on business in his own name, his principal being undisclosed; he has implied authority to order cigars (*i*). Where the licence was in the name of the principal, and the business was carried on in his name, the house being a " tied " house, the manager had no authority to buy goods from anyone other than the principal's nominee (*k*).

4. The manager of a manufacturing company has implied authority to order goods necessary for the company's business (*l*).

5. A is the manager of a business which he carries on in his own name as apparent principal. Drawing and accepting bills of exchange are incidental to the ordinary conduct of such a business. A has implied authority to accept a bill in the name in which the business is carried on (*i.e.*, his own name), and the principal is liable on a bill so accepted (*m*).

6. The general manager of a railway company has implied authority to order medical attendance for a servant of the company (*n*).

7. A station-master has no implied authority to pledge the credit of the railway company for medical attendance to an injured passenger (*o*).

8. The foreman of a saw-mill has implied authority to enter into a written contract for the sale of staves (*p*).

9. A traveller for the sale of goods in the provinces on behalf of a principal in London has implied authority to receive payment in money for the goods sold by him, but not to accept other goods by way of payment (*q*).

10. The matron of a hospital has implied authority to pledge the credit of the managing committee, for meat supplied for the use of the hospital (*r*).

11. A is the bailiff of a large farming establishment, all payments and receipts in reference thereto passing through his hands. He has no implied

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(*e*) *Re Pearson*, [1899] 2 Q. B. 618 ; 68 L. J. Q. B. 878.

(*f*) *The Huntsman*, [1894] P. 214 ; *Barker* v. *Highley* (1863), 32 L. J. C. P. 270 ; 15 C. B. (N.S.) 27.

(*g*) *Robinson* v. *Gleadow* (1835), 2 Bing. N. C. 156 ; 42 R. R. 568.

(*h*) *Thomas* v. *Lewis* (1878), 4 Ex. D. 18 ; 48 L. J. Ex. 7.

(*i*) *Watteau* v. *Fenwick*, *supra*.

(*k*) *Daun* v. *Simmins* (1879), 41 L. T. 783, C. A.

(*l*) *Smith* v. *Hull Glass Co.* (1852), 11 C. B. 897 ; 21 L. J. C. P. 106 ; 87 R. R. 804.

(*m*) *Edmunds* v. *Bushell* (1865), L. R. 1 Q. B. 97 ; 35 L. J. Q. B. 20.

(*n*) *Walker* v. *G. W. Ry.* (1867), L. R. 2 Ex. 228. Comp. Illustration 7.

(*o*) *Cox* v. *Midland Ry.* (1849), 3 Ex. 268 ; 77 R. R. 623. See also *Houghton* v. *Pilkington*, [1912] 3 K. B. 308 ; 82 L. J. K. B. 79. Comp. *Langan* v. *G. W. Ry.* (1874), 30 L. T. 173 ; 26 L. T. 577, Ex. Ch. ; and Illustration 6.

(*p*) *Richardson* v. *Cartwright* (1844), 1 C. & K. 328.

(*q*) *Howard* v. *Chapman* (1831), 4 C. & P. 508 ; 34 R. R. 814. See *International Sponge Importers* v. *Watt*, [1911] A. C. 279 ; 81 L. J. P. C. 12, H. L.

(*r*) *Real and Personal Advance Co.* v. *Phalempin* (1893), 9 T. L. R. 569, C. A.

authority, as such, to draw or indorse bills of exchange in the name of his principal (*s*).

12. A rent collector has no implied authority, as such, to receive notice to quit from a tenant (*t*). A steward has such implied authority (*u*), but not to grant leases for terms of years (*a*).

13. The cashier of a picture engraver has no implied authority to sell his master's engravings (*b*).

14. A groom or coachman has no implied authority, as such, to pledge the credit of his master for forage for the master's horses (*c*).

15. *Insurance agents.*—A is the agent of an insurance company, and has authority to receive the payment of premiums within fifteen days of their becoming due. He has no implied authority to accept payment after the expiration of that time (*d*). So, a local agent of an insurance company has no implied authority to grant, or contract to grant, policies on behalf of the company, that being outside the ordinary scope of his employment and duties (*e*).

*Directors and agents of companies.*—Directors of unincorporated companies have only such powers as are expressly or by necessary implication conferred upon them by the members (*f*).

16. A is the resident agent and manager of a mine for an unincorporated company. He has implied authority to purchase goods necessary for the working of the mine (*g*)—but not to borrow money, however pressing may be the necessity for a loan (*h*)—on the credit of the shareholders. So, directors of an unincorporated mining company have implied authority to employ mining officers, and purchase on the credit of the members of the company goods necessary for working the mine, and to make any other contracts usual or necessary in the management thereof in the ordinary way (*i*), but not to bind the members by negotiable instruments, nor to borrow money on their credit, either for the purpose of carrying on the mine or for any other purpose, however useful and necessary.

17. The directors of a banking or ordinary trading company have, however, implied authority to borrow money for the purpose of the business of the company (*k*). It has been held that directors who have express authority

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(*s*) *Davidson* v. *Stanley* (1841), 3 Scott N. R. 49 ; 58 R. R. 556.
(*t*) *Pearse* v. *Boulter* (1860), 2 F. & F. 133.
(*u*) *Roe* d. *Rochester* v. *Pierce* (1809), 2 Camp. 96 ; 11 R. R. 673.
(*a*) *Collen* v. *Gardner* (1856), 21 Beav. 540 ; 111 R. R. 195.
(*b*) *Graves* v. *Masters* (1883), 1 C. & E. 73.
(*c*) *Wright* v. *Glyn*, [1902] 1 K. B. 745 ; 71 L. J. K. B. 497, C. A.
(*d*) *Acey* v. *Fernie* (1840), 7 M. & W. 151 ; 56 R. R. 671. See also *London & Lancs. Ass. Co.* v. *Fleming*, [1897] A. C. 499 ; 66 L. J. P. C. 116, P. C.
(*e*) *Linford* v. *Provincial, etc., Ins. Co.* (1864), 34 Beav. 291.
(*f*) *Dickinson* v. *Valpy* (1829), 5 M. & R. 126 ; 34 R. R. 348 ; *Burmester* v. *Norris* (1851), 6 Ex. 796 ; 21 L. J. Ex. 43.
(*g*) *Hawken* v. *Bourne* (1841), 8 M. & W. 703 ; 58 R. R. 853.
(*h*) *Hawtayne* v. *Bourne* (1841), 7 M. & W. 595 ; 56 R. R. 806 ; *Ricketts* v. *Bennett* (1847), 17 L. J. C. P. 17 ; 4 C. B. 686 ; 72 R. R. 691.
(*i*) *Tredwen* v. *Bourne* (1840), 6 M. & W. 461 ; 55 R. R. 689 ; *Steigenberger* v. *Carr* (1841), 3 M. & G. 191.
(*k*) *Re Hamilton's Windsor Ironworks Co., ex p. Pitman and Edwards* (1879), 12 Ch. D. 707 ; *Maclae* v. *Sutherland* (1854), 3 E. & B. 1 ; 23 L. J. Q. B. 229 ; 97 R. R. 332 ; *Royal British Bank* v. *Turquand* (1855), 24 L. J. Q. B. 327 ; 5 E. & B. 240.

to fix the time and place for, and to adjourn, general meetings of the company, have no implied authority to postpone a general meeting which has been duly convened (*l*).

18. *Arresting offenders, etc.*—Authority to arrest or give persons into custody is only implied when the duties of the agent could not efficiently be performed without such authority (*m*). A bank manager has no implied authority to arrest or prosecute supposed offenders on behalf of the bank (*m*). The manager of a restaurant has implied authority to give into custody persons behaving in a riotous manner (*n*).

## Article 39

IMPLIED AUTHORITY WHERE EMPLOYED IN COURSE OF BUSINESS AS AGENT

Every agent who is authorised to do any act in the course of his trade, profession, or business as an agent, has implied authority to do whatever is usually incidental, in the ordinary course of such trade, profession, or business, to the execution of his express authority (*o*), but not to do anything which is unusual in such trade, profession, or business, or which is neither necessary for nor incidental to the execution of his express authority (*p*).

*Illustrations*

1. A bailiff is authorised to distrain for rent. He has implied authority to receive the rent and expenses due, and a tender thereof to him operates as a tender to the landlord (*q*).

2. An insurance broker is authorised to subscribe a policy for an underwriter. He has implied authority to adjust a loss arising thereunder (*r*), and to refer a dispute about such a loss to arbitration (*s*).

3. A horse-dealer is authorised to sell a horse. He has implied authority to warrant it (*t*).

4. A commission agent, authorised to make a bet in his own name on behalf of his principal, had implied authority to pay the bet if he lost it (*u*).

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(*l*) *Smith* v. *Paringa Mines*, [1906] 2 Ch. 193 ; 75 L. J. Ch. 702.

(*m*) *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270 ; 48 L. J. P. C. 25, P. C. See also Article 102.

(*n*) *Ashton* v. *Spiers* (1893), 9 T. L. R. 606. Comp. *Stedman* v. *Baker* (1896), 12 T. L. R. 451, C. A.

(*o*) *Young* v. *Cole* (1837), 6 L. J. C. P. 201 ; 3 Bing. N. C. 724 ; 43 R. R. 783 ; *Sutton* v. *Tatham* (1839), 8 L. J. Q. B. 210 ; 10 Ad. & E. 27 ; 50 R. R. 312 ; Illustrations 1 to 4. See also pp. 60 *et seq.* for implied authority of factors, brokers, auctioneers, solicitors, etc.

(*p*) *Wiltshire* v. *Sims* (1808), 1 Camp. 258 ; 10 R. R. 673 ; *Daun* v. *Simmins* (1879), 41 L. T. 783, C. A. ; *Poirier* v. *Morris* (1853), 22 L. J. Q. B. 313 ; 2 El. & Bl. 89 ; 95 R. R. 449 ; *Smith* v. *Webster* (1876), 3 Ch. D. 49 ; 45 L. J. Ch. 528, C. A. Illustrations 5 to 9. See also pp. 60 *et seq.*

(*q*) *Hatch* v. *Hale* (1850), 15 Q. B. 10 ; 19 L. J. Q. B. 289 ; 81 R. R. 480. As to a tender to a man left in possession by the bailiff, see *Boulton* v. *Reynolds* (1859), 29 L. J. Q. B. 11 ; 2 El. & E. 369 ; 119 R. R. 765.

(*r*) *Richardson* v. *Anderson* (1805), 1 Camp. 43, n. ; 10 R. R. 628, n.

(*s*) *Goodson* v. *Brooke* (1815), 4 Camp. 163.

(*t*) *Howard* v. *Sheward* (1866), L. R. 2 C. P. 148 ; 36 L. J. C. P. 42.

(*u*) *Read* v. *Anderson* (1884), 13 Q. B. D. 779 ; 53 L. J. Q. B. 532, C. A.

No action now lies, however, for the recovery from the principal of any amount so paid, in consequence of the provisions of the Gaming Act, 1892 (*a*).

5. A is employed as a general agent for the sale of goods intrusted to his possession. He has no implied authority to pledge the goods (*b*). So, authority to sell shares does not confer authority to pledge them (*c*).

6. An architect was employed to make plans for building certain houses. Having made the plans, he instructed a quantity surveyor to take out quantities, and then invited tenders, all of which exceeded the limits of the building owner's proposed expenditure. The quantity surveyor sued the building owner for his fees for taking out the quantities, relying on an alleged custom in the building trade, by which the liability for such fees was thrown on the building owner in cases where no tender was accepted. The jury having found that there was no custom by which an architect was authorised to employ a surveyor without the sanction of the building owner, and the owner not having expressly authorised the employment, it was held that the defendant was not liable (*d*).

7. A house furnisher's salesman, employed at a salary and commission, has no authority to cancel a sale effected by him (*e*).

8. A commission agent is authorised to buy goods in England on behalf of a foreign principal. It is not usual to pledge the credit of the foreign principal in such cases. The agent has no implied authority to pledge the principal's credit, and the fact that they have agreed to share the profit and loss does not affect this rule (*f*).

9. An estate agent is instructed to find a purchaser for certain property. He receives an offer, which he submits to his principal. The principal then instructs him to withdraw part of the property, and names the lowest price for the remainder. He has no implied authority to enter into a contract for the sale of the property, though the price is specified, because it is not usual for estate agents to enter into contracts on behalf of their principals, unless expressly authorised to do so, their duty being merely to submit to their principals any offers which may be made to them (*g*). But where an owner of certain houses instructed a house and estate agent to sell them, and agreed to pay a commission on the price accepted, it was held that, the agent having submitted an offer to the principal, who notified to him his acceptance of the price offered, the agent had authority to make and sign a contract for sale on the principal's behalf (*h*).

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(*a*) 55 Vict. c. 9. See Article 71.
(*b*) *City Bank* v. *Barrow* (1880), 5 App. Cas. 664, H. L.
(*c*) *Waltho* v. *Brooks* (1885), 1 T. L. R. 565.
(*d*) *Antisell* v. *Doyle*, [1899] 2 Ir. R. 275.
(*e*) *Leckenby* v. *Woolman*, [1921] W. N. 100.
(*f*) *Hutton* v. *Bulloch* (1874), L. R. 9 Q. B. 572, Ex. Ch. ; *Poirier* v. *Morris* (1853), 2 El. & Bl. 89 ; 22 L. J. Q. B. 313 ; 95 R. R. 449.
(*g*) *Chadburn* v. *Moore* (1892), 61 L. J. Ch. 674 ; *Hamer* v. *Sharp* (1874), L. R. 19 Eq. 108 ; 44 L. J. Ch. 53 ; *Thuman* v. *Best* (1907), 97 L. T. 239 ; *Lewcock* v. *Bromley* (1920), 37 T. L. R. 48. See also *Vale of Neath Colliery* v. *Furness* (1876), 45 L. J. Ch. 276 ; cf. *Keen* v. *Mear*, [1920] 2 Ch. 574 ; 89 L. J. Ch. 513 ; principle approved in *Wragg* v. *Lovett*, [1948] 2 All E. R. 968, C. A. ; see *dicta* as to the extent of authorisation of an estate agent to enter into a contract for his principal.
(*h*) *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267 ; 69 L. J. Ch. 569 ; *Allen* v. *Whiteman* (1920), 89 L. J. Ch. 534.

## Article 40

### AUTHORITY IMPLIED FROM SPECIAL USAGES

Every agent has implied authority to act, in the execution of his express authority, according to the usage and customs of the particular place, market, or business in which he is employed (*i*).

Provided, that no agent has implied authority to act in accordance with any usage or custom which is unreasonable, unless the principal had notice of such usage or custom at the time when he conferred the authority (*k*), or to act in accordance with any usage or custom which is unlawful.

The question whether any particular usage or custom is unreasonable or unlawful is a question of law. In particular a usage or custom which changes the intrinsic character of the contract of agency (*l*), or a usage or custom whereby an agent who is authorised to receive payment of money may receive payment by way of set-off, or by way of a settlement of accounts between himself and the person from whom he is authorised to receive payment (*m*), is unreasonable.

*Illustrations*

1. A was authorised to sell manure. The jury found that it was customary to sell manure with a warranty. Held, that A had implied authority to give a warranty on a sale of the manure (*n*).

2. A is authorised to sell a certain class of goods. It is customary to sell goods of that class on credit. A has implied authority to sell the goods on credit (*o*).

3. A share-broker, employed to transact business at a particular place, has implied authority to act in accordance with the reasonable usages of that place (*p*).

4. A bill-broker in London was intrusted with bills for discounting. The jury found that it was usual for bill-brokers in London to raise money by depositing their customers' bills *en bloc*, the brokers alone being looked to by the customers, and that the parties contracted in reference to such usage. Held, that the broker had implied authority to pledge the bills together with bills of his own and those of other customers (*q*). The authority and duties of a bill-broker depend upon the course of dealing and usage of the particular place where he is employed (*q*).

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(*i*) Illustrations 1 to 10 ; *Sutton* v. *Tatham* (1839), 10 A. & E. 27 ; 8 L. J. Q. B. 210 ; 50 R. R. 312 ; *Harker* v. *Edwards* (1887), 57 L. J. Q. B. 147, C. A. ; *Lienard* v. *Dresslar* (1862), 3 F. & F. 212.

(*k*) *Campbell* v. *Hassel* (1816), 1 Stark. 233 ; *Pollock* v. *Stables* (1848), 12 Q. B. 765 ; 17 L. J. Q. B. 352 ; 76 R. R. 419 ; *Robinson* v. *Mollett* (1874), L. R. 7 H. L. 802 ; 44 L. J. C. P. 362, H. L. Illustrations 9 to 12.

(*l*) Illustrations 9 to 11.

(*m*) Illustration 12.

(*n*) *Dingle* v. *Hare* (1859), 7 C. B. (N.S.) 145 ; 29 L. J. C. P. 143.

(*o*) *Pelham* v. *Hilder* (1841), 1 Y. & Coll. C. C. 3 ; 57 R. R. 208.

(*p*) *Pollock* v. *Stables* (1848), 12 Q. B. 765 ; 17 L. J. Q. B. 352 ; 76 R. R. 419.

(*q*) *Foster* v. *Pearson* (1835), 4 L. J. Ex. 120 ; 1 C. M. & R. 849 ; 40 R. R. 744.

5. A broker, a member of the Stock Exchange, when authorised to sell certain bonds, has implied authority, if it be discovered that the bonds are not genuine, to rescind the sale and repay the purchaser the price, in accordance with the usage of the Stock Exchange (*r*).

6. A stockbroker, authorised to buy or sell or carry over shares or stock, has implied authority, according to usage, to execute the order by means of several contracts, or to execute any portion or portions of it (*s*).

7. A broker, authorised to sell shares on the Stock Exchange, has implied authority to sell under the rules and regulations there in force, except so far as they are unreasonable and unknown to the principal (*t*), and to do all things necessary to complete the contract according to such rules and regulations (*u*).

8. A broker is authorised to buy wool in the Liverpool market. By a custom of that market, a broker so authorised may buy either in his own name or in the name of his principal, without giving the principal notice whether he has bought in his own name or not. Such a custom is not unreasonable, and the principal is bound by a contract made in the name of the broker, though he had no notice of the custom or of the fact that the contract was made by the broker in his own name (*a*).

9. A broker is authorised to buy 50 tons of tallow. It is customary in the tallow trade for a broker to make a single contract in his own name for the purchase of a sufficiently large quantity of tallow to supply the orders of several principals, and to parcel it out amongst them. The broker has no implied authority to purchase a larger quantity than 50 tons and allocate 50 tons thereof to the principal, unless the principal was aware of the usage at the time when he gave the authority, because the effect of such a usage is to change the intrinsic character of the contract of agency by turning the agent into a principal, and thus giving him an interest at variance with his duty (*b*).

10. By the usage of the Stock Exchange, a broker who is instructed by several principals to buy or sell or carry over shares in the same undertaking, may make one contract in his own name for the total number of shares and apportion them amongst the principals, and may include in the contract shares in which he is dealing on his own account ; and thereupon the jobber with whom he deals and each principal become bound to carry out such portion of the contract as is appropriated to them respectively. The usage is reasonable and binding on a principal, whether he was aware of it or not (*c*). In this illustration, the result of the usage is that although in form there is only one contract, in effect there are separate contracts between the jobber and

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(*r*) *Young* v. *Cole* (1837), 3 Bing. N. C. 724 ; 43 R. R. 783 ; 6 L. J. C. P. 201.

(*s*) *Benjamin* v. *Barnett* (1903), 19 T. L. R. 564.

(*t*) *Harker* v. *Edwards* (1887), 57 L. J. Q. B. 147, C. A. ; *Hodgkinson* v. *Kelly* (1868), 37 L. J. Ch. 837 ; *Coles* v. *Bristowe* (1868), L. R. 4 Ch. 3 ; 38 L. J. Ch. 81 ; *M'Ewen* v. *Woods* (1847), 11 Q. B. 13 ; 17 L. J. Q. B. 206 ; 75 R. R. 274.

(*u*) *Bowring* v. *Shepherd* (1871), L. R. 6 Q. B. 309 ; 40 L. J. Q. B. 129, Ex. Ch.

(*a*) *Cropper* v. *Cook* (1868), L. R. 3 C. P. 194.

(*b*) *Robinson* v. *Mollett* (1874), L. R. 7 H. L. 802 ; 44 L. J. C. P. 362, H. L. ; *Bostock* v. *Jardine* (1865), 34 L. J. Ex. 142 ; 3 H. & C. 700. Comp. Illustration 10.

(*c*) *Scott* v. *Godfrey*, [1901] 2 K. B. 726 ; 70 L. J. K. B. 954 ; *Beckhuson* v. *Hamblett*, [1901] 2 K. B. 73 ; 70 L. J. K. B. 600, C. A. See also *Re Rogers, ex parte Rogers* (1880), 15 Ch. D. 207, C. A. ; *May* v. *Angeli* (1898), 14 T. L. R. 551, H. L. ; *Consolidated Goldfields* v. *Spiegel* (1909), 100 L. T. 351.

each principal on which they may sue and be sued, whereas in Illustration 9 the result of the usage was that there was no contract on which the principal could sue the other contracting party at all.

11. A broker is authorised to sell stock. A custom of the Stock Exchange, whereby he is himself permitted to take over the stock at the price of the day if he is unable to find a purchaser, is unreasonable, and such a transaction is not binding on the principal unless he had notice of the custom (*d*).

12. An insurance broker is authorised to receive from the underwriters payment of money due under a policy. A custom at Lloyd's whereby the broker may settle with the underwriters by way of set-off is unreasonable, and the principal is not bound by such a settlement unless he was aware of the custom when he authorised the broker to receive payment (*e*). The same rule applies to stockbrokers settling with agents (*f*).

## *Implied authority of particular classes of agents, as incidental to their employment*

### 1. Factors

Where goods are intrusted to a factor for sale, he has implied authority—

1. To sell them in his own name (*g*).
2. To sell at such times and for such prices as he thinks best (*h*).
3. To sell on reasonable credit (*i*).
4. To warrant the goods sold, if it be usual to warrant that class of goods (*k*).
5. To receive payment of the price, if he sell in his own name (*l*).

A factor has no implied authority, as such—

1. To delegate his authority, whether acting under a *del credere* commission or not (*m*).

2. To barter (*n*) or pledge goods (*o*), or the bill of lading for goods (*p*), intrusted to him for sale. Even where he has accepted bills drawn by the principal to be provided for out of the proceeds of the goods, he has no implied authority to raise money by pledging the goods for the purpose of meeting the bills (*q*).

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(*d*) *Hamilton* v. *Young* (1881), L. R. 7 Ir. 289, Ir.
(*e*) See Article 33, Illustration 7.
(*f*) See Article 33, Illustration 6.
(*g*) *Baring* v. *Corrie* (1818), 2 B. & A. 137 ; 20 R. R. 383 ; *Re Henley, ex p. Dixon* (1876), 4 Ch. D. 133 ; 46 L. J. Bk. 20, C. A.
(*h*) *Smart* v. *Sandars* (1846), 17 L. J. C. P. 258 ; 3 C. B. 380 ; 75 R. R. 849.
(*i*) *Houghton* v. *Matthews* (1803), 3 B. & P. 485, 489 ; 7 R. R. 815 ; *Scott* v. *Surman* (1742), Willes 400.
(*k*) *Dingle* v. *Hare* (1859), 7 C. B. (N.S.) 145 ; 29 L. J. C. P. 143.
(*l*) *Drinkwater* v. *Goodwin* (1775), Cowp. 251.
(*m*) *Cockran* v. *Irlam* (1813), 2 M. & S. 301 ; 15 R. R. 257 ; *Solly* v. *Rathbone* (1814), 2 M. & S. 298.
(*n*) *Guerreiro* v. *Peile* (1820), 3 B. & A. 616 ; 22 R. R. 500.
(*o*) *Martini* v. *Coles* (1813), 1 M. & S. 140 ; *Paterson* v. *Tash* (1743), 2 Str. 1178 ; *Guichard* v. *Morgan* (1819), 4 Moo. 36. See, however, Article 88 as to the rights of third persons dealing with him in good faith.
(*p*) *Newsom* v. *Thornton* (1805), 6 East 17 ; 8 R. R. 378.
(*q*) *Gill* v. *Kymer* (1821), 5 Moore 503 ; *Fielding* v. *Kymer* (1821), 2 B. & B. 639.

## 2. Brokers

A broker has implied authority—

1. Where he has entered into a contract, to sign an entry in his book, or to sign bought and sold notes, on behalf of both buyer and seller, as a memorandum of the contract for the purpose of satisfying the provisions of section 4 of the Sale of Goods Act, 1893 (*r*).

2. To sell on reasonable credit, where there is no usage to the contrary (*s*).

3. Where he sells for an undisclosed principal, to receive payment of the price in accordance with the terms of the contract (*t*).

4. To act in accordance with the usage, rules, and regulations of the market in which he deals, except so far as they are illegal or unreasonable, or alter the intrinsic nature of the contract of agency (*u*).

5. To close his account with the principal who fails to pay differences ; or, in a proper case, to close part only of the account (*a*).

A broker has no implied authority, as such—

1. To contract in his own name (*b*).

2. To cancel contracts made by him (*c*).

3. To pay total or partial losses on behalf of his underwriters (*d*).

4. To receive payment for an undisclosed principal otherwise than in accordance with the terms of the original contract, or to receive payment by way of set-off (*e*).

5. To delegate his authority, whether acting under a *del credere* commission or not (*f*).

6. To pledge bills intrusted to him to get discounted (*g*), in the absence of a particular custom sanctioning such a pledge (*h*).

7. To sell stock or shares on credit, even when he considers it for the principal's benefit (*i*).

8. To receive payment of the price of goods sold by him, when the principal is disclosed (*k*).

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(*r*) 56 & 57 Vict. c. 71 ; *Parton* v. *Crofts* (1864), 33 L. J. C. P. 189 ; 16 C. B. (N.S.) 11 ; *Thompson* v. *Gardiner* (1876), 1 C. P. D. 777. See Article 95.

(*s*) *Boorman* v. *Brown* (1842), 3 Q. B. 511 ; (1844), 11 C. & F. 1, H. L. ; *Wiltshire* v. *Sims* (1808), 1 Camp. 258.

(*t*) *Campbell* v. *Hassel* (1816), 1 Stark. 233.

(*u*) Illustrations 1 to 12, above.

(*a*) Article 70, Illustration 12.

(*b*) *Baring* v. *Corrie* (1818), 2 B. & A. 137.

(*c*) *Xenos* v. *Wickham* (1866), L. R. 2 H. L. 296 ; 36 L. J. C. P. 313, H. L.

(*d*) *Bell* v. *Auldjo* (1784), 4 Doug. 48.

(*e*) *Campbell* v. *Hassel* (1816), 1 Stark. 233 ; *Pearson* v. *Scott* (1878), 9 Ch. D. 198 ; 47 L. J. Ch. 705 ; Article 33, Illustrations 6 and 7.

(*f*) *Henderson* v. *Barnewell* (1827), 1 Y. & J. 387 ; *Cockran* v. *Irlam* (1813), 2 M. & S. 301.

(*g*) *Haynes* v. *Foster* (1833), 3 L. J. Ex. 153 ; 2 C. & M. 237.

(*h*) *Foster* v. *Pearson* (1835), 1 C. M. & R. 849 ; 4 L. J. Ex. 120.

(*i*) *Wiltshire* v. *Sims* (1808), 1 Camp. 258.

(*k*) *Linck* v. *Jameson* (1886), 2 T. L. R. 206, C. A.

### 3. Auctioneers

An auctioneer has implied authority at a sale by auction to sign a contract or memorandum thereof on behalf of both vendor and purchaser, and his signature is a sufficient compliance with the Sale of Goods Act, 1893, s. 4, or of the Law of Property Act, 1925, s. 40, in an action against either part for specific performance or for damages for breach of contract (*l*).

An auctioneer has no implied authority, as such—

1. To rescind a sale (*m*).

2. To warrant goods (*n*).

3. To take a bill of exchange in payment, where it is provided that the price shall be paid to him (*o*).

4. To sign the vendor's name to any contract except the contract of sale (*p*).

5. To sell by private contract, even where the public sale proves abortive and he is offered more than the reserve price (*q*).

6. To deliver goods sold without payment, or to allow a set-off due from the seller to the buyer (*r*).

7. To deal, after sale, with the terms on which a title shall be made. He is an agent for sale only (*s*).

### 4. Counsel

Where counsel is employed to conduct a case, he has implied authority, subject to any express instructions to the contrary (*t*)—

1. To consent to a non-suit (*u*), or to the withdrawal of a juror (*x*).

2. To compromise or abandon the claims of his client, or give an undertaking on his behalf, in respect of all matters within the scope of the suit or matter (*a*), but not in respect of anything beyond the scope thereof (*b*).

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(*l*) 56 & 57 Vict. c. 71 ; 15 Geo. 5, c. 20 ; *Kemeys* v. *Proctor* (1820), 1 Jac. & Walk. 350 ; *Shelton* v. *Livius* (1832), 2 C. & J. 411 ; *Emmerson* v. *Heelis* (1809), 2 Taunt. 38 ; *White* v. *Proctor* (1811), 4 Taunt. 209 ; *Wallace* v. *Roe*, [1903] 1 Ir. R. 32.

(*m*) *Nelson* v. *Aldridge* (1818), 2 Stark. 435.

(*n*) *Payne* v. *Leconfield* (1882), 51 L. J. Q. B. 642.

(*o*) *Williams* v. *Evans* (1866), L. R. 1 Q. B. 352 ; 35 L. J. Q. B. 111 ; *Sykes* v. *Giles* (1839), 5 M. & W. 645 ; 9 L. J. Ex. 106.

(*p*) *Megaw* v. *Molloy* (1878), L. R. 2 Ir. 530. See also *Van Praagh* v. *Everidge*, [1903] 1 Ch. 434 ; 72 L. J. Ch. 260, C. A.

(*q*) *Daniel* v. *Adams* (1764), Ambl. 495 ; *Marsh* v. *Jelf* (1862), 3 F. & F. 234. An agent abroad, instructed to buy goods at an auction, has authority to buy by private contract before the auction, at less than the price limited by his instructions, *Stein* v. *Cope* (1883), Cab. & El. 63.

(*r*) *Brown* v. *Staton* (1816), 2 Chit. 353.

(*s*) *Seton* v. *Slade* (1802), 7 Ves. 265, 276.

(*t*) See *Neale* v. *Gordon-Lennox*, [1902] A. C. 465 ; 71 L. J. K. B. 939, H. L. ; *Lewis* v. *Lewis* (1890), 45 Ch. D. 281 ; 59 L. J. Ch. 712 ; *Shepherd* v. *Robinson*, [1919] 1 K. B. 474 ; 88 L. J. K. B. 873.

(*u*) *Lynch* v. *Coel* (1865), 12 L. T. 548.

(*x*) *Strauss* v. *Francis* (1866), L. R. 1 Q. B. 379 ; 35 L. J. Q. B. 133.

(*a*) *Re Wood, ex p. Wenham* (1872), 21 W. R. 104 ; *Chambers* v. *Mason* (1858), 28 L. J. C. P. 10 ; 5 C. B. (N.S.) 59 ; *Hargrave* v. *Hargrave* (1850), 19 L. J. Ch. 261 ; 12 Beav. 408 ; *Matthews* v. *Munster* (1887), 20 Q. B. D. 141 ; 57 L. J. Q. B. 49, C. A.

(*b*) *Ellender* v. *Wood* (1888), 4 T. L. R. 680, C. A.

3. To enter into an agreement with the counsel on the other side as to the subject-matter of the suit or matter, or as to costs (*c*), but not as to anything beyond the scope of the suit or matter (*d*).

4. To consent to an order (*e*).

5. Generally, to do all other things appertaining to the conduct of the case according to his absolute discretion (*f*).

Where counsel is instructed to plead a contract of sale, he has authority to sign, in the pleading, a memorandum sufficient to satisfy the Law of Property Act, 1925, s. 40 (*g*), or the Sale of Goods Act, 1893, s. 4 (*h*).

## 5. Solicitors

A solicitor has implied authority—

1. To receive payment of a debt for which he is instructed to sue (*i*).

2. To receive the consideration for a deed upon its production duly executed and containing a receipt for such consideration by the person entitled to give a receipt therefor (*k*).

3. Where he is authorised to conduct an action—
   (a) to compromise (*l*) ; or refer the subject-matter thereof to arbitration (*m*) ;
   (b) to abandon the claims of his client, provided that they are within the scope of the action, but not where they are collateral thereto (*n*) ;
   (c) to enter into an undertaking in reference to the subject-matter thereof (*o*).

4. Where he is authorised to proceed to satisfaction—
   (a) to issue and indorse a writ of *fi. fa.*, and do all other acts necessary to obtain the fruits of the judgment (*p*) ;

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(*c*) *Strauss* v. *Francis* (1866), L. R. 1 Q. B. 379 ; 35 L. J. Q. B. 133 ; *Swinfen* v. *Swinfen* (1858), 27 L. J. Ch. 35 ; 2 De G. & J. 381 ; *Re West Devon Mine* (1888), 38 Ch. D. 51 ; 57 L. J. Ch. 850, C. A.

(*d*) *Kempshall* v. *Holland* (1895), 14 R. 336, C. A.

(*e*) *Mole* v. *Smith* (1820), 1 Jac. & Walk. 673 ; *Re Hobler* (1844), 8 Beav. 101 ; *Furnival* v. *Bogle* (1827), 4 Russ. 142.

(*f*) *Strauss* v. *Francis, supra* ; *Lynch* v. *Coel* (1865), 12 L. T. 548.

(*g*) 15 Geo. 5, c. 20 ; *Grindell* v. *Bass*, [1920] 2 Ch. 487 ; 89 L. J. Ch. 591, the memorandum was contained in the defence of the first defendant so that the second defendant subsequently joined could plead it as a sufficient memorandum.

(*h*) 56 & 57 Vict. c. 71 ; *Farr, Smith & Co.* v. *Messers*, [1928] 1 K. B. 397 ; 97 L. J. K. B. 126 ; the date of the reconstituted action, as here, is the date of the commencement of the action within the meaning of the rule in *Lucas* v. *Dixon* (1889), 22 Q. B. D. 357.

(*i*) *Yates* v. *Freckleton* (1781), 2 Doug. 623. The authority extends to the solicitor's London agent who issues and indorses the writ : *Weary* v. *Alderson* (1837), 2 M. & Rob. 127.

(*k*) Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 69 ; Trustee Act, 1925 (15 Geo. 5, c. 19), s. 23 extending the principle to solicitors of trustees.

(*l*) *Butler* v. *Knight* (1867), L. R. 2 Ex. 109 ; 36 L. J. Ex. 66 ; *Prestwich* v. *Poley* (1865), 34 L. J. C. P. 189 ; 18 C. B. (N.S.) 806 ; *Chown* v. *Parrott* (1863), 32 L. J. C. P. 197 ; 14 C. B. (N.S.) 74 ; *Re Newen*, [1903] 1 Ch. 812 ; 72 L. J. Ch. 356 ; *Welsh* v. *Roe* (1918), 87 L. J. K. B. 520. See also *Little* v. *Spreadbury*, [1910] 2 K. B. 658 ; 79 L. J. K. B. 1119 (client's conduct inducing solicitor to believe he had authority). Comp. *Re A Debtor*, [1914] 2 K. B. 758 ; 83 L. J. K. B. 1176 (compromise after judgment held not binding).

(*m*) *Faviell* v. *Eastern Counties Ry.* (1848), 2 Ex. 344 ; 17 L. J. Ex. 297 ; 76 R. R. 615 ; *Smith* v. *Troup* (1849), 7 C. B. 757 ; 18 L. J. C. P. 209.

(*n*) *Re Wood, ex p. Wenham* (1872), 21 W. R. 104.

(*o*) *Re Commonwealth Land, etc. Co., ex p. Hollington* (1873), 43 L. J. Ch. 99.

(*p*) *Jarmain* v. *Hooper* (1843), 1 D. & L. 769 ; 64 R. R. 861 ; *Morris* v. *Salberg* (1889), 22 Q. B. D. 614, C. A.

(b) to order the sheriff to withdraw from possession under a writ of *fi. fa.* (*q*) ; but his managing clerk has no such implied authority, though left in charge of the office and business during the temporary absence of his employer (*r*) ;

(c) to compromise, after judgment (*s*).

A solicitor has no implied authority, as such—

1. To interplead or agree to postpone execution after a judgment in his client's favour, he being then *functus officio*, unless authorised to proceed (*t*).

2. To direct the sheriff to seize particular goods, when issuing a writ of *fi. fa.*, or otherwise to interfere with the sheriff in the performance of his duties (*u*).

3. To institute any action or suit (*x*).

4. To compromise a claim on behalf of his client before an action has been commenced in respect thereof (*y*).

5. To sign a memorandum of a contract of which he is instructed to prepare a draft, so as to satisfy the provisions of the Law of Property Act, 1925 (*z*).

6. To receive the purchase-money for property sold (except on production of a deed, as above (*a*)).

7. To receive payment of a mortgage debt, though authorised to receive payment of the interest and permitted to have possession of the mortgage deed (*b*).

8. To take a cheque in lieu of cash in payment of a mortgage debt, of which he is authorised to receive payment (*c*).

9. To pledge the credit of his client to counsel for fees (*d*).

10. To take special journeys, or go to foreign parts, on his client's behalf (*e*).

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(*q*) *Levi* v. *Abbott* (1849), 4 Ex. 588 ; 19 L. J. Ex. 62.

(*r*) *Whyte* v. *Nutting*, [1897] 2 Ir. R. 241.

(*s*) *Butler* v. *Knight* (1867), L. R. 2 Ex. 109 ; 36 L. J. Ex. 66. Comp. *Re A Debtor* [1914] 2 K. B. 758 ; 83 L. J. K. B. 1176 ; note (*l*), p. 63, *ante*.

(*t*) *James* v. *Ricknell* (1887), 20 Q. B. D. 164 ; 57 L. J. Q. B. 113 ; *Lovegrove* v. *White* (1871), L. R. 6 C. P. 550 ; 40 L. J. C. P. 253. But see *Sandford* v. *Porter*, [1912] 2 Ir. R. 551.

(*u*) *Smith* v. *Keal* (1882), 9 Q. B. D. 340, C. A.

(*x*) *Wright* v. *Castle* (1817), 3 Meriv. 12 ; *Atkinson* v. *Abbott* (1855), 3 Drew. 251.

(*y*) *Macaulay* v. *Polley*, [1897] 2 Q. B. 122 ; 66 L. J. Q. B. 665, C. A.

(*z*) 15 & 16 Geo. 5, c. 20, s. 40 ; *Howard* v. *Braithwaite* (1812), 1 Ves. & B. 202 ; *Smith* v. *Webster* (1876), 3 Ch. D. 49 ; 45 L. J. Ch. 528, C. A. But see *Griffiths Cycle Corpn.* v. *Humber*, [1899] 2 Q. B. 414 ; 68 L. J. Q. B. 959, C. A. ; *North* v. *Loomes*, [1919] 1 Ch. 378 ; 88 L. J. Ch. 217 ; *Horner* v. *Walker*, [1923] 2 Ch. 218 ; 92 L. J. Ch. 573.

(*a*) P. 63, *ante* ; *Viney* v. *Chaplin* (1858), 27 L. J. Ch. 434 ; 2 De G. & J. 468 ; 119 R. R. 213 ; *Ex p. Swinbanks, re Shanks* (1879), 11 Ch. D. 525 ; 48 L. J. Bk. 120, C. A.

(*b*) *Wilkinson* v. *Candlish* (1850), 5 Ex. 91 ; 19 L. J. Ex. 166 ; 82 R. R. 588 ; *Kent* v. *Thomas* (1856), 1 H. & N. 473.

(*c*) *Blumberg* v. *Life Interests, etc., Corpn.*, [1897] 1 Ch. 171 ; [1898] 1 Ch. 27 ; 66 L. J. Ch. 127 ; 67 *ib.* 118, C. A.

(*d*) *Mostyn* v. *Mostyn, ex p. Barry* (1870), L. R. 5 Ch. 457 ; 39 L. J. Ch. 780.

(*e*) *Re Snell* (1877), 5 Ch. D. 815, C. A. ; *Re Price* (1845), 9 Beav. 234 ; *Re Bevan* (1855), 20 Beav. 146.

## 6. Shipmasters (*f*)

The extent of a shipmaster's authority to sell or hypothecate the ship, cargo, or freight, or to bind his principals personally by contract, is determined by the law of the country to which the ship belongs, and the ship's flag operates as notice to all the world that the master's authority is limited by the law of that flag (*g*). Thus, if an English cargo be hypothecated by the master of an Italian ship, the validity of the bond is governed by Italian law, and if found to be valid by that law, it will be enforced by the English Courts, although the conditions required for its validity by English law were not fulfilled (*h*).

A shipmaster is appointed for the purpose of conducting the voyage on which the ship is engaged to a favourable termination, and has implied authority to do all things necessary for the due and proper prosecution of that voyage (*i*). He has also implied authority to enter into contracts in respect of the usual employment of the ship (*k*). But he can only bind personally those persons who appointed him or were privy to his appointment (*l*). The mere fact that a person is a registered owner of the vessel is not sufficient to render him liable on the master's contracts ; it must appear that the master is, or has been held out as, his agent (*l*). Thus, if the ship be chartered, and the possession and control thereof given up to the charterers, who appoint the master, the owners are not liable on a bill of lading or other contract entered into by the master (*m*). The same principle applies if the vessel be chartered, and the possession and control given up, to the master himself (*n*).

The master of a British ship has implied authority—

1. To contract for the conveyance of merchandise according to the usual employment of the ship (*o*).

2. To enter into a charterparty on behalf of the owners, when he is in a foreign port and there is difficulty in communicating with the owners (*p*).

3. To render salvage services to vessels in distress (*q*).

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(*f*) See also Scrutton on Charter-Parties and Bills of Lading (15th ed.), in particular Articles 16, 97 *et seq.*

(*g*) *The Karnak* (1869), L. R. 2 P. C. 505 ; 38 L. J. Ad. 57, P. C. ; *The August*, [1891] P. 328 ; 60 L. J. P. 57 ; *Lloyd* v. *Guibert* (1865), 33 L. J. Q. B. 241 ; 6 B. & S. 100, 120, Ex. Ch.

(*h*) *The Gaetano and Maria* (1882), 7 P. D. 137 ; 51 L. J. Ad. 67, C. A.

(*i*) *Arthur* v. *Barton* (1840), 6 M. & W. 138 ; *Beldon* v. *Campbell* (1851), 6 Ex. 886. It is doubtful whether he has implied authority to make an agreement binding his owners to arbitration ; see *The City of Calcutta* (1899), 79 L. T. 517, C. A., where an application to stay an action, under the Arbitration Act, 1889, s. 4, was refused because of such doubtfulness.

(*k*) *Grant* v. *Norway* (1851), 20 L. J. C. P. 93 ; 10 C. B. 665 ; 84 R. R. 747 ; *McLean* v. *Fleming* (1871), 2 H. L. Sc. App. 128.

(*l*) *Mackenzie* v. *Pooley* (1856), 11 Ex. 638 ; 25 L. J. Ex. 124 ; 105 R. R. 698 ; *Mitcheson* v. *Oliver* (1855), 5 E. & B. 419, Ex. Ch. ; *Myers* v. *Willis* (1856), 25 L. J. C. P. 255 ; 18 C. B. 886 ; *Baker* v. *Buckle* (1822), 7 Moo. 349. As to holding out, see Article 5, Illustration 4.

(*m*) *Baumvoll Manufactur* v. *Furness*, [1893] A. C. 8 ; 62 L. J. Q. B. 201, H. L.

(*n*) *Frazer* v. *Marsh* (1811), 13 East 238 ; *Reeve* v. *Davis* (1834), 1 A. & E. 312 ; *Colvin* v. *Newberry* (1832), 1 C. & F. 283. Comp. *Steel* v. *Lester* (1877), 3 C. P. D. 121 ; 47 L. J. C. P. 43 ; *Associated Portland Cement Manufrs.* v. *Ashton*, [1915] 2 K. B. 1 ; 84 L. J. K. B. 519, C. A.

(*o*) *Runquist* v. *Ditchell* (1801), 3 Esp. 64.

(*p*) *The Fanny*, *The Mathilda* (1883), 5 Asp. M. C. 75 ; *Grant* v. *Norway* (1851), 10 C. B. 665 ; 20 L. J. C. P. 93.

(*q*) *The Thetis* (1869), L. R. 2 Ad. 365 ; 38 L. J. Ad. 42.

4. To enter into reasonable towage agreements (*r*).

5. To enter into reasonable salvage agreements, if necessary for the owners' benefit ; but not merely for the purpose of saving the lives of the master and crew without regard to saving the owners' property. A salvage agreement operates as a charge on the property saved, and is only binding to the extent of the value of that property (*s*).

6. To pledge his principals' credit, at home or abroad, for fit and proper repairs and stores necessary for the equipment of the vessel on her voyage, such as a prudent owner himself would order (*t*), provided that it is reasonably necessary to obtain them on the principals' credit (*u*).

7. To borrow money on his principals' credit, at home or abroad, when the advance is necessary for the prosecution of the voyage, communication with the principals is not practicable, and they have no solvent agent on the spot (*a*). To render the principals liable for such an advance, the lender must prove—(1) that there was a reasonable necessity, according to the ordinary course of prudent conduct to borrow on their credit (*b*) (this is a question of fact (*a*)) ; (2) that the amount was advanced expressly for the use of the ship (*c*) ; (3) that the money was expended on the ship (*d*). There is no implied authority to pledge the credit of the principals when it is reasonably practicable to communicate with them (*a*), or when there is a solvent agent on the spot (*u*). Nor is there implied authority to pledge their credit for services already rendered (*a*). The state of accounts between the master and his principals does not affect his implied authority to borrow on their credit (*e*).

8. To hypothecate the ship, cargo, and freight (bottomry) when communication with the respective owners is impracticable (*f*), and it is necessary to obtain supplies or repairs in order to prosecute the voyage, and impossible to obtain them on personal credit, or in any other way than by hypothecation (*g*). But there is no implied authority to hypothecate either ship or cargo for necessaries already supplied (*g*), or for the purpose of obtaining

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(*r*) *Wellfield* v. *Adamson* (*The Alfred*) (1884), 5 Asp. M. C. 214 ; *The Arthur* (1862), 6 L. T. 556.

(*s*) *The Renpor* (1883), 8 P. D. 115 ; 52 L. J. P. 49 ; *The Mariposa*, [1896] P. 273 ; 65 L. J. P. 104 ; *The Inchmaree*, [1899] P. 111 ; 68 L. J. P. 30. The Court will not enforce unreasonable or inequitable contracts for salvage or towage services : *The Medina* (1876), 2 P. D. 5, C. A. ; *The Silesia* (1880), 5 P. D. 177 ; *The Crusader*, [1907] P. 196, C. A.

(*t*) *Frost* v. *Oliver* (1853), 22 L. J. Q. B. 353 ; 1 C. L. R. 1003 ; *Webster* v. *Seekamp* (1821), 4 B. & A. 352 ; *The Riga* (1872), L. R. 3 Ad. 516 ; 41 L. J. Ad. 39.

(*u*) *Gunn* v. *Roberts* (1874), L. R. 9 C. P. 331 ; 43 L. J. C. P. 233 ; *Edwards* v. *Havill* (1853), 23 L. J. C. P. 8 ; 14 C. B. 107 ; *Mackintosh* v. *Mitcheson* (1849), 4 Ex. 175 ; 18 L. J. Ex. 385 ; 80 R. R. 513 ; *Pocahontas Fuel Co.* v. *Ambatielos* (1922), 27 Com. Cas. 148.

(*a*) *Arthur* v. *Barton* (1840), 6 M. & W. 138 ; *Beldon* v. *Campbell* (1851), 6 Ex. 886 ; *Stonehouse* v. *Gent* (1841), 2 Q. B. 431 ; *Johns* v. *Simons* (1842), 2 Q. B. 425 ; *Edwards* v. *Havill* (1853), 14 C. B. 107 ; *Rocher* v. *Busher* (1815), 1 Stark. 27 ; *Robinson* v. *Lyall* (1819) 7 Price 592.

(*b*) See note (*u*), *supra*.

(*c*) *Thacker* v. *Moates* (1831), 1 M. & Rob. 79.

(*d*) *Bogle* v. *Atty* (1818), Gow 50.

(*e*) *Williamson* v. *Page* (1844), 1 C. & K. 581.

(*f*) *Kleinwort* v. *Cassa Marrittima Genoa* (1877), 2 App. Cas. 156, P. C. ; *The Staffordshire* (1872), L. R. 4 P. C. 194 ; 41 L. J. Ad. 49, P. C. ; *The Panama* (1870), L. R. 3 P. C. 199 ; 39 L. J. Ad. 37 ; *The Olivier* (1862), 31 L. J. Ad. 137.

(*g*) *The Hersey* (1837), 3 Hagg. Ad. 404 ; *Hussey* v. *Christie* (1807), 13 Ves. 599 ; *The Ida* (1872), L. R. 3 Ad. 542 ; *Lyall* v. *Hicks* (1859), 27 Beav. 616 ; *The Faithful*

personal freedom from arrest (*h*), or where it is possible to obtain supplies in any other way (*g*). Where ship and cargo are hypothecated for repairs, the shipowners are bound to indemnify the owners of the cargo from liability under the bond (*i*).

9. To hypothecate the cargo alone (*respondentia*), when it is necessary for the benefit of the cargo or for the prosecution of the voyage (*k*), and communication with the owners is impracticable (*l*). The master has no implied authority to hypothecate or do any act seriously affecting the value of the cargo without first communicating, if practicable, with the owners thereof (*l*).

10. To sell the ship, in cases of urgent necessity, when it is not practicable to communicate with the owners (*m*). The burden of proving necessity lies on the party seeking to uphold the sale (*n*). It must be such a stringent necessity as leaves the master no alternative as a prudent and skilful man, acting in good faith for the best interests of all concerned, and with the best judgment that can be formed in the circumstances, except to sell the ship as she lies. If he sell hastily, either without sufficient examination into the condition of the ship, or without having previously made every exertion in his power with the means then at his disposal to extricate her, the sale is invalid, even if the danger at the time appeared exceedingly imminent (*o*). But where in consequence of damage it is impossible to prosecute the voyage, or there is no prospect of completing it (*p*), or where the ship is in a foreign port, and cannot be repaired except at such a cost as no prudent person would venture to incur, the master has implied authority to sell her (*q*).

11. To sell part of the cargo—but not the whole—where repairs are absolutely necessary for the prosecution of the voyage, and communication with the owners of the cargo is impracticable (*r*). But it is only in cases of extreme necessity, and only after he has done everything in his power to carry the cargo to its destination, that he has implied authority to sell any portion of it (*s*). He has no implied authority, in any case, to stop the voyage

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(1862), 31 L. J. Ad. 81 ; *Soares* v. *Rahn* (1838), 3 Moo. P. C. C. 1, P. C. ; *Heathorn* v. *Darling* (1836), 1 Moo. P. C. 5 ; *Stainbank* v. *Shepard* (1853), 22 L. J. Ex. 341 ; 13 C. B. 418, Ex. Ch.

(*h*) *Smith* v. *Gould* (1842), 4 Moo. P. C. C. 21, P. C.

(*i*) *Duncan* v. *Benson* (1848), 1 Ex. 537 ; 74 R. R. 754. Affirmed *sub nom. Benson* v. *Duncan* (1849), 3 Ex. 644 ; 18 L. J. Ex. 169, Ex. Ch.

(*k*) *The Sultan* (1859), Swa. 504 ; *The Gratitudine* (1801), 3 Rob. 240.

(*l*) *The Onward* (1873), L. R. 4 Ad. 38 ; 42 L. J. Ad. 61 ; *The Hamburg* (1863), 33 L. J. Ad. 116 ; 2 Moo. P. C. C. (N.S.) 289, P. C.

(*m*) *The Australia* (1859), 13 Moo. P. C. C. 132, P. C. ; *The Margaret Mitchell* (1858), Swa. 382.

(*n*) *Cobequid Marine Ins. Co.* v. *Barteaux* (1875), L. R. 6 P. C. 319 ; *Knight* v. *Faith* (1850), 15 Q. B. 649 ; 19 L. J. Q. B. 509. Held necessary in *The Glasgow* (1856), Swa. 145 ; *The Victor* (1865), 13 L. T. 21 ; *The Australia* (1859), 13 Moo. P. C. C. 132, P. C. ; *Ireland* v. *Thomson* (1847), 4 C. B. 149 ; 17 L. J. C. P. 241 ; *Robertson* v. *Clarke* (1824), 1 Bing. 445. Sale set aside as unnecessary in *The Bonita*, *The Charlotte* (1861), 30 L. J. Ad. 145 ; *The Eliza Cornish*, or *The Segredo* (1853), 1 Spinks 36.

(*o*) *Cobequid Marine Ins. Co.* v. *Barteaux* (1875), L. R. 6 P. C. 319.

(*p*) *Ireland* v. *Thomson* (1847), 17 L. J. C. P. 241 ; 4 C. B. 149 ; *Hunter* v. *Parker* (1840), 7 M. & W. 322.

(*q*) *The Australia* (1859), 13 Moo. P. C. C. 132, P. C. ; *Idle* v. *Royal Exchange Ass. Co.* (1819), 3 Moo. 115.

(*r*) *The Gratitudine* (1801), 3 Rob. 240 ; *Australasian S. N. Co.* v. *Morse* (1872) L. R. 4 P. C. 222, P. C. ; *Duncan* v. *Benson*, *supra*.

(*s*) See next page.

and sell the whole of the cargo in a foreign port, even when it is impossible to prosecute the original voyage and the sale is most beneficial for the owners in the circumstances (*s*). The authority of the master as an agent of the owners of the cargo is strictly an authority of necessity (*t*).

The master of a British ship has no implied authority—

1. To vary any contract made by the owners (*u*).

2. To agree for the substitution of another voyage in place of that agreed upon between the owners and freighters, or make any contract outside the scope of that voyage (*a*).

3. To hold out any person as an agent to charter the vessel (*b*).

4. To sign a bill of lading at a lower freight than the owner contracted for (*c*), or making the freight payable to any other person than the owner (*d*).

5. To sign a bill of lading for goods not actually received (*e*), or for a greater quantity than are actually received, on board (*f*). His authority is limited to signing for goods actually received on board, and all persons taking a bill of lading, by indorsement or otherwise, are deemed to have notice that his authority is so limited (*f*). The Bills of Lading Act, 1855 (*g*), s. 3—providing that every bill of lading, in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment against the master or other person signing the same, notwithstanding such goods or part thereof may not have been shipped, etc.—applies only as against the persons who have actually signed the bill of lading (*h*), and does not make the master's signature conclusive evidence against the owners (*i*). The master's signature is *prima facie* evidence against the owners that the goods were put on board (*k*) ; but they are permitted to prove that in fact they were not (*i*), unless there is an agreement that the bill of lading shall be conclusive against the owners as to the quantity shipped (*l*).

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(*s*) *Atlantic Mutual Ins. Co.* v. *Huth* (1879), 16 Ch. D. 474, C. A. ; *Wilson* v. *Millar* (1816), 2 Stark. 1 ; *Joseph* v. *Knox* (1813), 3 Camp. 320 ; *Van Omeron* v. *Dowick* (1809), 2 Camp. 42 ; *Cannan* v. *Meaburn* (1823), 1 Bing. 243 ; *Acatos* v. *Burns* (1878), 3 Ex. D. 282 ; 47 L. J. Ex. 566, C. A.

(*t*) *Gibbs* v. *Grey* (1857), 26 L. J. Ex. 286 ; 2 H. & N. 22 ; *Freeman* v. *E. I. Co.* (1822), 5 B. & A. 617.

(*u*) *Grant* v. *Norway* (1851), 10 C. B. 665 ; 20 L. J. C. P. 93 ; *Pearson* v. *Göschen* (1864), 33 L. J. C. P. 265 ; 17 C. B. (N.S.) 352.

(*a*) *Burgon* v. *Sharpe* (1810), 2 Camp. 529.

(*b*) *The Fanny*, *The Mathilda* (1883), 5 Asp. M. C. 75.

(*c*) *Pickernell* v. *Jauberry* (1862), 3 F. & F. 217.

(*d*) *Reynolds* v. *Jex* (1865), 34 L. J. Q. B. 241 ; 7 B. & S. 86.

(*e*) *Grant* v. *Norway*, *supra* ; *Cox* v. *Bruce* (1886), 18 Q. B. D. 147 ; 56 L. J. Q. B. 121, C. A. Comp. *British Columbia, etc., Co.* v. *Nettleship* (1868), L. R. 3 C. P. 499 ; 37 L. J. C. P. 235 ; see also Scrutton on Charter-Parties and Bills of Lading (15th ed.), Article 20.

(*f*) *Hubbersty* v. *Ward* (1853), 8 Ex. 330 ; 22 L. J. Ex. 113 ; *Thorman* v. *Burt* (1886), 54 L. T. 349, C. A.

(*g*) 18 & 19 Vict. c. 111.

(*h*) *Jessel* v. *Bath* (1867), L. R. 2 Ex. 267 ; 36 L. J. Ex. 149.

(*i*) *Meyer* v. *Dresser* (1864), 33 L. J. C. P. 289 ; 16 C. B. (N.S.) 646 ; *Brown* v. *Powell Duffryn Coal Co.* (1875), L. R. 10 C. P. 562 ; 44 L. J. C. P. 289.

(*k*) *M'Lean* v. *Fleming* (1871), 2 H. L. Sc. App. 128, H. L. ; *Smith* v. *Bedouin S. N. Co.*, [1896] A. C. 70 ; 65 L. J. P. C. 8, H. L. Sc. ; *Bennett* v. *Bacon* (1897), 13 T. L. R. 204.

(*l*) *Lishman* v. *Christie* (1887), 19 Q. B. D. 333 ; 56 L. J. Q. B. 538, C. A. ; *Crossfield* v. *Kyle Shipping Co.*, [1916] 2 K. B. 885 ; 85 L. J. K. B. 1310, C. A.

# CHAPTER IV

## DELEGATION

### Article 41

WHEN AGENT MAY DELEGATE HIS AUTHORITY

No agent has power to delegate his authority, or to appoint a sub-agent to do any act on behalf of the principal, except with the express or implied authority of the principal. The authority of the principal is implied in the following cases :—

(1) Where the employment of a sub-agent is justified by the usage of the particular trade or business in which the agent is employed, provided that such usage is not unreasonable, nor inconsistent with the express terms of the agent's authority or instructions (*a*).

(2) Where the principal knows, at the time of the agent's appointment, that the agent intends to delegate his authority (*b*).

(3) Where, from the conduct of the principal and agent, it may reasonably be presumed to have been their intention that the agent should have power to delegate his authority (*c*).

(4) Where, in the course of the agent's employment, unforeseen emergencies arise which render it necessary for the agent to delegate his authority (*c*).

(5) Where the authority conferred is of such a nature as to necessitate its execution wholly or in part by means of a deputy or sub-agent (*b*).

(6) Where the act done is purely ministerial, and does not involve confidence or discretion (*d*).

The maxim "*Delegatus non potest delegare*" is founded on the confidential character of the contract of agency, and whenever authority is coupled with a discretion or confidence, it must, as a general rule, be executed by the agent

(*a*) *De Bussche* v. *Alt* (1877), 8 Ch. D. 286 ; 47 L. J. Ch. 381, C. A. ; Illustration 6.

(*b*) *Quebec, etc., Ry.* v. *Quinn* (1858), 12 Moo. P. C. C. 232, P. C. ; *Dew* v. *Met. Ry.* (1885), 1 T. L. R. 358 ; Illustration 6.

(*c*) *De Bussche* v. *Alt, supra ; Gwilliam* v. *Twist*, [1895] 2 Q. B. 84 ; 64 L. J. Q. B. 474, C. A. ; *Harris* v. *Fiat Motors* (1906), 22 T. L. R. 556 ; *Tarn* v. *Scanlan*, [1928] A. C. 35 ; 97 L. J. K. B. 267.

(*d*) Illustrations 4 and 5 ; *Mason* v. *Joseph* (1804), 1 Smith 406 ; *Rossiter* v. *Trafalgar Life Ass. Co.* (1859), 27 Beav. 377 ; *St. Margaret's Burial Board* v. *Thompson* (1871), L. R. 6 C. P. 445 ; 40 L. J. C. P. 213 ; *Hemming* v. *Hale* (1859), 29 L. J. C. P. 137 ; 7 C. B. (N.S.) 487.

in person (*e*). Thus, auctioneers (*f*), factors (*g*), directors (*h*), liquidators (*i*), brokers (*k*), etc., have in general, no implied authority to employ deputies or sub-agents. Where there is an absolute necessity for the appointment of a sub-agent, the appointment must be made with discretion (*l*).

*Solicitors' town agents.*—A country solicitor has implied authority to act through his London agent when necessary or usual in the ordinary course of business, and the acts of such agent in reference to the matters intrusted to him bind the client (*m*). Where a London agent has the general conduct of an action, he has the same general authority in conducting it, including authority to compromise, as the country solicitor employing him, in the absence of any express limits on such general authority (*n*). But a solicitor cannot delegate his entire employment to his London agent so as to make the agent his client's solicitor (*o*).

*Trustees.*—A trustee may employ a broker when investing trust funds and may pay the purchase money to him, the trustee will not be liable for any loss thereby occasioned if he follows the usual and regular course of business adopted by ordinary prudent men (*p*). This principle applies even if the trustee is paid for his services (*q*), and where a co-trustee is employed as a broker under a clause in the trust document (*r*). Apart from the general principles, the ability of a trustee to delegate his powers is governed by the Trustee Act, 1925 (*s*).

*Illustrations*

1. A shipmaster was authorised to sell certain goods. Held, that he had no implied authority to send them on to another person for sale, though he was unable himself to find a purchaser (*t*).

2. A board constituted by statute was authorised to delegate its powers to a committee. Held, that the committee must exercise in concert the powers delegated to them, and could not apportion them amongst themselves (*u*).

3. The directors of a company were given power to purchase the company's own shares, and also to appoint a general manager. Held, that the power to

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(*e*) *Combe's Case*, 9 Co. Rep. 75 (vol. 5, p. 135) ; *Blore* v. *Sutton* (1816), 3 Meriv. 237 ; 17 R. R. 74 ; *Symonds* v. *Kurtz* (1889), 61 L. T. 559.

(*f*) *Coles* v. *Trecothick* (1804), 9 Ves. 234.

(*g*) *Cockran* v. *Irlam* (1813), 2 M. & S. 301 ; *Catlin* v. *Bell* (1815), 4 Camp. 183 ; *Solly* v. *Rathbone* (1814), 2 M. & S. 298.

(*h*) *Re Leeds Banking Co., Howard's Case* (1866), L. R. 1 Ch. 561 ; 36 L. J. Ch. 42.

(*i*) *Ex p. Birmingham Banking Co.* (1868), L. R. 3 Ch. 651.

(*k*) *Henderson* v. *Barnewell* (1827), 1 Y. & J. 387 ; *Cockran* v. *Irlam* (1813), 2 M. & S. 301.

(*l*) See also on this topic generally §§ 17, 18, 79-81, 142, 318, 362, 406, 428, 458 of the American Restatement.

(*m*) *Griffiths* v. *Williams* (1787), 1 T. R. 710 ; *Weary* v. *Alderson* (1837), 2 M. & Rob. 127 ; *Solley* v. *Wood* (1852), 16 Beav. 370. See Article 42, Illustrations 9 and 10.

(*n*) *Re Newen*, [1903] 1 Ch. 812 ; 72 L. J. Ch. 356.

(*o*) *Wray* v. *Kemp* (1883), 26 Ch. D. 169 ; 53 L. J. Ch. 1020. See also *Re Beckett*, [1918] 2 Ch. 72 ; 87 L. J. Ch. 457.

(*p*) *Speight* v. *Gaunt* (1883), 9 App. Cas. 1.

(*q*) *Jobson* v. *Palmer*, [1893] 1 Ch. 1 ; 72 L. J. Ch. 180.

(*r*) *Shepherd* v. *Harris*, [1905] 2 Ch. 310 ; 74 L. J. Ch. 574.

(*s*) 15 Geo. 5, c. 19.

(*t*) *Catlin* v. *Bell* (1815), 4 Camp. 183.

(*u*) *Cook* v. *Ward* (1877), 2 C. P. D. 255, C. A. ; but see *Agnew* v. *Manchester Corporation* (1902), 67 J. P. 174 ; 1 L. G. R. 9.

purchase shares could not be delegated by the directors to the general manager (*a*). Directors of companies governed by the Companies Clauses Consolidation Act, 1845 (*b*), or by the provisions of Table A of the Companies Act, 1948, may, however, delegate their authority to committees consisting of one or more of themselves.

4. An agent buys property at a sale by auction, and the auctioneer enters his name as buyer without objection by the principal, who is present at the sale. The entry is a sufficient memorandum of the contract as against the principal (*c*). But where a tenant for life had a power to lease, and a memorandum of a contract for a lease was signed by his agent's clerk with the approval of the agent and in the ordinary course of business, it was held that the memorandum was not sufficient to satisfy the Statute of Frauds, not having been signed by a duly authorised agent within the meaning of that statute (*d*).

5. An agent has authority to draw bills of exchange in the principal's name. The authority may be exercised through the agent's clerk (*e*). So, an authority given to an agent to indorse a particular bill in the principal's name may be delegated, because such acts are purely ministerial and involve no discretion (*e*). So, it was held that though four liquidators had no power to authorise one of their number to accept bills of exchange on behalf of them all, they might authorise him to accept a particular bill on their behalf, because the execution of the former authority would involve discretion, whereas the latter was an authority to do a purely ministerial act (*f*).

## Article 42

### RELATIONS BETWEEN PRINCIPAL AND SUB-AGENT

There is no privity of contract between a principal and sub-agent, as such, whether the sub-agent was appointed with the authority of the principal or not ; and the rights and duties arising out of the contracts between the principal and agent, and between the agent and sub-agent, respectively, are only enforceable by and against the immediate parties thereto (*g*). Provided, that the relation of principal and agent may be established by an agent between his principal and a third person, if the agent be expressly

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(*a*) *Cartmell's Case* (1874), L. R. 9 Ch. 691 ; 43 L. J. Ch. 588.
(*b*) 8 & 9 Vict. c. 16.
(*c*) *White* v. *Proctor* (1811), 4 Taunt. 209 ; *Coles* v. *Trecothick* (1804), 9 Ves. 234.
(*d*) *Blore* v. *Sutton* (1816), 3 Meriv. 237 ; 17 R. R. 74. And see *Doe* d. *Rhodes* v. *Robinson* (1837), 6 L. J. C. P. 235 ; 3 Bing. N. C. 677.
(*e*) *Ex p. Sutton* (1788), 2 Cox 84 ; *Lord* v. *Hall* (1848), 2 C. & K. 698. See also *Kenworthy* v. *Schofield* (1824), 2 B. & C. 945 ; *White* v. *Proctor* (1811), 4 Taunt. 209 ; *Brown* v. *Tombs*, [1891] 1 Q. B. 253 ; 60 L. J. Q. B. 38.
(*f*) *Ex p. Birmingham Banking Co.* (1868), L. R. 3 Ch. 651.
(*g*) *Calico Printers' Association* v. *Barclays Bank* (1931), 145 L. T. 51, C. A. ; *New Zealand and Australian Land Co.* v. *Watson* (1881), 7 Q. B. D. 374 ; 50 L. J. Q. B. 433, C. A. ; *Robbins* v. *Fennell* (1847), 11 Q. B. 248 ; 17 L. J. Q. B. 77 ; *Schmaling* v. *Tomlinson* (1815), 6 Taunt. 147 ; *Scott* v. *Crawford* (1842), 4 M. & G. 1031 ; *Hannaford* v. *Syms* (1898), 79 L. T. 30 ; *Kahler* v. *Midland Bank*, [1950] A. C. 24 ; [1949] 2 All E. R. 621, H. L. ; Illustrations 2 to 10.

or impliedly authorised to constitute such relation, and it is the intention of the agent and of such third person that such relation should be constituted (*h*).

Where a sub-agent is appointed without the authority, express or implied, of the principal, the principal is not bound by his acts (*i*).

The tests to be applied in deciding whether an agent has implied authority to create privity of contract between his principal and a sub-agent have been enumerated by Thesiger, L.J., in *De Bussche* v. *Alt* (*k*), they are : May it reasonably be presumed from (1) the conduct of the parties to the original contract, (2) the usage of trade, or (3) the nature of the particular business, that the parties to the original contract intended that such authority should exist ; or alternatively has some unforeseen emergency arisen which necessitates the employment of a sub-agent. There must be a clear authority to create privity of contract; the principal's knowledge of or consent to the employment of a sub-agent are not in themselves enough to imply authority to the agent (*l*).

*Illustrations*

1. A ship was consigned to A, an agent in China, for sale, a minimum price being fixed. A, with the knowledge and consent of the principal, employed B to sell the ship. B, being unable to find a purchaser, bought the ship himself at the minimum price, and subsequently resold her at a large profit. It was held that privity of contract existed between the principal and B, and that B was liable to account to the principal for the profit made on the re-sale (*m*).

2. A factor was employed to sell goods on a *del credere* commission. The factor, with the principal's authority, employed a broker on an ordinary commission to sell the goods. The broker sold the goods and received the proceeds, and made payments on account to the factor from time to time. While the balance of the proceeds was still in the hands of the broker, the factor, being then indebted to the broker in respect of other independent transactions, became bankrupt. Held—(1) that there was no privity of contract between the principal and the broker ; (2) that the broker was not liable to account to the principal for the proceeds of the goods sold ; (3) that the principal was not entitled to recover the balance of the proceeds from the broker in the factor's name without allowing the amount due from the factor to the broker in respect of other transactions to be set off, though the broker had reason to believe that the factor was acting as an agent (*n*).

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(*h*) Illustration 1.

(*i*) See *Doe* d. *Rhodes* v. *Robinson* (1837), 3 Bing. N. C. 677 ; *Blore* v. *Sutton* (1816), 3 Meriv. 237 ; *Wray* v. *Kemp* (1883), 26 Ch. D. 169 ; 53 L. J. Ch. 1020. Illustrations 7 and 8.

(*k*) (1877), 8 Ch. D. 286 at 310 ; 47 L. J. Ch. 381, C. A.

(*l*) *New Zealand and Australian Land Co.* v. *Watson* (1881), 7 Q. B. D. 374 ; 50 L. J. Q. B. 433, C. A. See also 76 S. J. 677 for a discussion of this subject and §§ 79 to 81 of the American Restatement.

(*m*) *De Bussche* v. *Alt* (1877), 8 Ch. D. 286 ; 47 L. J. Ch. 381, C. A. ; *Powell* v. *Jones*, [1905] 1 K. B. 11 ; 74 L. J. K. B. 115, C. A.

(*n*) *New Zealand and Australian Land Co.* v. *Watson* (1881), 7 Q. B. D. 374 ; 50 L. J. Q. B. 433, C. A. See, however, *Blackburn* v. *Mason* (1893), 68 L. T. 510, C. A.

3. The plaintiffs appointed Barclays Bank agents to collect the price of goods sold to a purchaser in Syria. The Bank instructed sub-agents to collect the money and remit it to them and to warehouse and insure the goods if the purchaser should fail to take delivery. The purchaser did not take delivery and the sub-agents failed to insure the goods, which were destroyed by fire. Held that the plaintiffs could not recover against the sub-agents because no privity had been established between them and the plaintiffs. Wright, J., did not accept the argument that privity was created inasmuch as the employment of the sub-agent was in the known course of business (*o*).

4. An agent appointed a sub-agent to manage the principal's affairs. The sub-agent took over the entire management thereof, and communicated with the principal direct. Held, that the sub-agent was not liable to render an account of his agency to the principal (*p*). The rule is that sub-agents must account to the agents employing them, and the agents to their principals (*q*). An agent is only liable to account to his own principal (*r*).

5. A employs B to transport goods to a foreign market. B, without A's knowledge or consent, delegates his entire employment to C. There is no privity of contract between A and C, and A is not liable to C for his charges, even if he has not paid B for the services rendered (*s*).

6. A employs B to procure a loan on usual terms. B employs C, who obtains a loan on terms which are unusual. A is not liable to C for commission, unless he ratifies the terms of the loan and recognises C as his agent (*t*).

7. A factor delegates his employment without the authority of the principal. The sub-agent has no lien for duties, etc., paid by him, as against the principal (*u*).

8. A authorises B, a shipbroker, to receive payment of freight. B cannot delegate the authority, and A is not bound by the payment of the freight to the sub-agent (*a*).

*Solicitors' town agents*

9. The London agent of a country solicitor, in the ordinary course receives, as such, the proceeds of a cause in which he is engaged. There is no privity of contract between the client and the London agent, and the client cannot recover the proceeds from him as money received to the client's use (*b*). So, a London agent, in the ordinary course, gives credit to the country solicitor and not to the client, and has no remedy, except his lien, against the client

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(*o*) *Calico Printers' Association* v. *Barclays Bank* (1931), 145 L. T. 51, C. A.
(*p*) *Lockwood* v. *Abdy* (1845), 14 Sim. 437. And see *Cartwright* v. *Hateley* (1791), 1 Ves. jun. 292.
(*q*) *Stephens* v. *Badcock* (1832), 1 L. J. K. B. 75 ; 3 B. & Ad. 354 ; *Sims* v. *Britain* (1832), 1 N. & M. 594 ; *Montagu* v. *Forwood*, [1893] 2 Q. B. 350, C. A.
(*r*) *Att.-Gen.* v. *Chesterfield* (1854), 18 Beav. 596 ; *Pinto* v. *Santos* (1814), 1 Marsh. 132 ; *Maw* v. *Pearson* (1860), 28 Beav. 196.
(*s*) *Schmaling* v. *Tomlinson* (1815), 6 Taunt. 147.
(*t*) *Mason* v. *Clifton* (1863), 3 F. & F. 899.
(*u*) *Solly* v. *Rathbone* (1814), 2 M. & S. 298.
(*a*) *Dunlop* v. *De Murrieta* (1886), 3 T. L. R. 166, C. A.
(*b*) *Robbins* v. *Fennell* (1847), 11 Q. B. 248 ; 17 L. J. Q. B. 77 ; 75 R. R. 363. And see *Hannaford* v. *Syms* (1898), 79 L. T. 30.

for costs, and such lien, as against the client, is limited to the amount due from the client to the country solicitor (*c*). The Court may, however, in exercise of its summary jurisdiction over its own officers, order a London agent to pay over to the client money received, the agent claiming to retain the amount in satisfaction of a debt due to him from the country solicitor (*d*). or having received it without the authority of either the country solicitor or the client (*e*).

10. A client gives money to his solicitor to pay a debt and costs. The solicitor remits the amount, by means of his own cheque, to his London agent for the purpose of paying such debt and costs. The agent retains the amount in satisfaction of a debt due to him from the solicitor. The agent is not liable to the client in an action for money had and received to the client's use (*f*). So, if a London agent receive money improperly, the remedy of the client is against his own solicitor, not against the agent (*g*).

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(*c*) *Ex p. Edwards, re Johnson* (1881), 7 Q. B. D. 155 ; 8 Q. B. D. 262 ; 51 L. J. Q. B. 108, C. A. ; *Waller* v. *Holmes* (1860), 30 L. J. Ch. 24 ; 1 Johns. & H. 239 ; *Farewell* v. *Coker* (1728), 2 P. W. 460.

(*d*) *Ex p. Edwards, supra ; Hanley* v. *Cassan* (1847), 11 Jur. 1088.

(*e*) *Robbins* v. *Fennell, supra ; Robbins* v. *Heath* (1848), 11 Q. B. 257, n.

(*f*) *Cobb* v. *Becke* (1845), 6 Q. B. 930 ; 14 L. J. Q. B. 108. See, however, *Ex p. Edwards, supra.*

(*g*) *Gray* v. *Kirby* (1834), 2 Dowl. 601. See, however, *Robbins* v. *Fennell, supra ; Robbins* v. *Heath, supra.*

# CHAPTER V

## DUTIES OF AGENTS

### Article 43

#### DUTY TO PERFORM HIS UNDERTAKING

EVERY agent who enters into an undertaking for valuable consideration is bound to perform the undertaking (*a*) ; but no agent is liable for the mere non-performance of that which he has undertaken to do gratuitously (*b*). Every agent must act in person, unless he is expressly or impliedly authorised by the principal to delegate his duties (*c*).

### Article 44

#### DUTY TO OBEY INSTRUCTIONS, OR ACT ACCORDING TO USAGE AND FOR THE PRINCIPAL'S BENEFIT

It is the duty of every agent strictly to pursue the terms of his authority and obey the lawful instructions of his principal (*d*) ; and, in the absence of express instructions, to act according to any lawful and reasonable usage applicable to the matter in hand (*e*), or where there is no special usage, and in all matters left to his discretion, to act in good faith, to the best of his judgment, and solely for the benefit of the principal (*f*).

*Execution of deeds under powers of attorney.*—It was formerly necessary, in order to render a deed executed under a power of attorney binding on the principal, or to entitle him to sue thereon, that the deed should be executed

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(*a*) *Turpin* v. *Bilton* (1843), 12 L. J. C. P. 167 ; 5 M. & G. 455. See § 377 of the American Restatement.

(*b*) *Coggs* v. *Bernard*, 2 Ld. Raym. 909 ; *Balfe* v. *West* (1853), 22 L. J. C. P. 175 ; 13 C. B. 466 ; *Elsee* v. *Gatward* (1793), 5 T. R. 143. See § 378 of the American Restatement.

(*c*) See Article 41.

(*d*) Illustrations 1 to 5. *Smart* v. *Sandars* (1846), 3 C. B. 380 ; 15 L. J. C. P. 39 ; *Ex p. Mather* (1797), 3 Ves. 372.

(*e*) Illustrations 6 to 10. *Solomon* v. *Barker* (1862), 2 F. & F. 726 ; *Moore* v. *Mourgue* (1776), Cowp. 479 ; *Hurrell* v. *Bullard* (1862), 3 F. & F. 445 ; *Re Overweg, Haas* v. *Durant*, [1900] 1 Ch. 209 ; 69 L. J. Ch. 255.

(*f*) *Gray* v. *Haig* (1854), 20 Beav. 219 ; *General Exchange Bank* v. *Horner* (1869), L. R. 9 Eq. 480 ; 39 L. J. Ch. 393 ; *East India Co.* v. *Henchman* (1791), 1 Ves. jun. 289 ; *Gwatkin* v. *Campbell* (1854), 1 Jur. (N.S.) 131 ; *Pariente* v. *Lubbock* (1855), 20 Beav. 588 ; 114 R. R. 1 ; *Comber* v. *Anderson* (1808), 1 Camp. 523 ; *Dyas* v. *Cruise* (1845), 8 Ir. Eq. R. 407 ; Illustration 11. See §§ 383, 384, 385, 387 of the American Restatement.

in his name (*g*). But the Law of Property Act, 1925 (*h*), s. 123, provides that the donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing, in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power ; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

*Illustrations*

1. An agent is instructed to sell certain shares when the funds reach eighty-five or more. He is bound to sell when the funds reach eighty-five, and has no discretion to wait until they go higher (*i*).

2. A by letter requests B to purchase 150 bales of cotton and forward a bill of lading, in exchange for which A undertakes to accept B's draft. B accepts the commission. B is bound to forward the bill of lading as soon as possible, and is not entitled to retain it until A gives security for payment. If he retain it, A is justified in refusing to accept the cotton (*k*).

3. A foreign merchant sends a bill of lading to his correspondent in England with instructions to insure the goods. If the correspondent accept the bill of lading, he is bound to insure (*l*).

4. A solicitor, retained to conduct an action, is expressly instructed by the client not to enter into any compromise. It is his duty to obey his client's instructions, even if counsel advise a compromise (*m*).

5. An auctioneer, at a sale without reserve, is instructed by the vendor not to sell for less than a certain sum. Such instructions are unlawful, and it is the duty of the auctioneer to accept the highest *bona fide* bid, even if it be for less than the sum mentioned (*n*).

6. A stockbroker is instructed to sell certain shares. It is his duty to sell for ready money, according to usage, in the absence of special directions to the contrary (*o*).

7. A stockbroker sells shares on behalf of a client. The shares are in the possession of the client's banker. The broker is under no obligation to pay to the banker the price at which the shares were sold against delivery of the shares, or to ask the jobber who bought them to pay the banker direct for them. He is only bound to carry the contract through according to the rules of the Stock Exchange, and the ordinary course of business (*p*).

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(*g*) See *White* v. *Cuyler* (1795), 6 T. R. 176 ; *Wilks* v. *Back* (1802), 2 East 142 ; *Berkeley* v. *Hardy* (1826), 5 B. & C. 355 ; *Frontin* v. *Small* (1726), 2 Ld. Raym. 1419 ; *Combe's Case*, 9 Co. Rep. 75.

(*h*) 15 Geo. 5, c. 20.

(*i*) *Bertram* v. *Godfray* (1830), 1 Knapp 381, P. C.

(*k*) *Barber* v. *Taylor* (1839), 5 M. & W. 527 ; 9 L. J. Ex. 21.

(*l*) *Smith* v. *Lascelles* (1788), 2 T. R. 187 ; *Corlett* v. *Gordon* (1813), 3 Camp. 472.

(*m*) *Fray* v. *Voules* (1859), 28 L. J. Q. B. 232 ; 1 El. & El. 839. And see *Swinfen* v. *Swinfen* (1858), 2 De G. & J. 381 ; and *Neale* v. *Gordon-Lennox*, [1902] A. C. 465, as to the duty of counsel to act according to his client's wishes.

(*n*) *Bexwell* v. *Christie* (1776), Cowp. 395.

(*o*) *Wiltshire* v. *Sims* (1808), 1 Camp. 258.

(*p*) *Hawkins* v. *Pearse* (1903), 9 Com. Cas. 87.

8. It is the duty of an auctioneer, in the absence of special instructions, to sell for ready money only (*q*), but he may take a cheque in lieu of cash in payment of the deposit, according to the usual custom (*r*). An agent ought not, however, to accept a cheque in lieu of cash which he has been authorised to receive, unless it is customary to do so in the particular business in which he is employed (*s*).

9. Goods are intrusted to a broker for sale. It is usual in the particular trade to send an estimate of the value to the principal, in order that he may fix a reserve price. It is the broker's duty to send such an estimate to his principal (*t*).

10. It is the duty of a house or estate agent, where he is instructed to find a purchaser for property, to submit any offers which may be made to him to his principal, and not to enter into a contract for the sale of the property unless the principal has expressly authorised him to do so (*u*). The duty to submit offers made continues until a binding contract of sale and purchase has been concluded (*a*).

11. A company's estate department acted for the vendor of a house. In ignorance of that fact, the company's building department acted for the purchaser and gave a report on the house which had the effect of reducing the price obtainable from the purchaser. Held, that the action of the building department was a breach of the company's duty to the vendor (*b*).

## Article 45

### DUTY TO KEEP PRINCIPAL'S PROPERTY SEPARATE, AND TO PRESERVE CORRECT ACCOUNTS

It is the duty of every agent—

(a) to keep the money and property of his principal separate from his own and from that of other persons (*c*) ;

(b) to preserve and be constantly ready with correct accounts of all his dealings and transactions in the course of his agency (*d*) ;

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(*q*) *Ferrers* v. *Robins* (1835), 2 C. M. & R. 152 ; *Williams* v. *Evans* (1866), L. R. 1 Q. B. 352 ; 35 L. J. Q. B. 111.

(*r*) *Farrer* v. *Lacy* (1885), 31 Ch. D. 42 ; 55 L. J. Ch. 149, C. A.

(*s*) *Pape* v. *Westacott*, [1894] 1 Q. B. 272 ; 63 L. J. Q. B. 222, C. A. ; Article 33.

(*t*) *Solomon* v. *Barker* (1862), 2 F. & F. 726.

(*u*) *Chadburn* v. *Moore* (1892), 61 L. J. Ch. 674 ; *Hamer* v. *Sharp* (1874), L. R. 19 Eq. 108 ; 44 L. J. Ch. 53 ; *Lewcock* v. *Bromley* (1920), 37 T. L. R. 48. Comp. *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267 ; 69 L. J. Ch. 569 ; *Keen* v. *Mear*, [1920] 2 Ch. 574 ; 89 L. J. Ch. 513 ; *Wragg* v. *Lovett*, [1948] 2 All E. R. 968, C. A. ; see Article 39.

(*a*) *Keppel* v. *Wheeler*, [1927] 1 K. B. 577 ; 96 L. J. K. B. 433, C. A.

(*b*) *Harrods, Ltd.* v. *Lemon*, [1931] 2 K. B. 157 ; 100 L. J. K. B. 219, C. A.

(*c*) *Gray* v. *Haig* (1854), 20 Beav. 219 ; *Clarke* v. *Tipping* (1846), 9 Beav. 284 ; *Guerreiro* v. *Peile* (1820), 3 B. & A. 616.

(*d*) *Gray* v. *Haig*, *supra* ; *Clarke* v. *Tipping*, *supra* ; *Pearse* v. *Green* (1819), 1 Jac. & W. 135 ; *Turner* v. *Burkinshaw* (1867), L. R. 2 Ch. 488 ; *Collyer* v. *Dudley* (1823), T. & R. 421. Comp. *Re Lee, ex p. Neville* (1868), L. R. 4 Ch. 43. See §§ 382, 388, 389 of the American Restatement.

(c) to produce to the principal, or to a proper person appointed by the principal, all books and documents in his hands relating to the principal's affairs (*e*) ; and

(d) to pay over to the principal, on request, money received in the course of the agency to the use of the principal (*f*).

Where an agent is permitted to retain for investment money belonging to his principal, he is in the position of a trustee (*g*).

Where an agent fails to keep and preserve correct accounts, and is called upon for an account of his agency, everything will be presumed against him that is consistent with established facts (*h*). So, if he mix the property of the principal with his own, everything not proved to be his own will be deemed to be the principal's (*i*).

Where an agent pays his principal's money into his own banking account, he is responsible for the amount, in the event of the failure of the banker, even if acting gratuitously (*k*).

An agent who improperly refuses to pay over money on request is chargeable with interest from the date of the request (*l*).

*Right to documents on determination of agency.*—The principal is entitled to have delivered to him on the determination of the agency documents concerning his affairs which have been prepared by the agent. In each case it is necessary to decide whether the relationship of principal and agent or professional man and client exists between the parties. Land agents have been ordered to hand over memorandum books, a private rental and cash book and a field book (*m*) ; an architect was ordered to deliver up the plans of a house after the work had been completed and paid for (*n*), both the land agents and the architect were considered to be agents. But memoranda prepared by quantity surveyors for their own use in measuring up buildings were held to be their own property (*o*) ; and documents, books, maps, and plans prepared by rating valuers employed to give advice and assistance to a County Council remained the property of the valuers (*p*).

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(*e*) *Dadswell* v. *Jacobs* (1887), 34 Ch. D. 278 ; 56 L. J. Ch. 233, C. A. (The principal cannot call upon him to produce documents, etc., to an improper person, such as a rival or unfriendly person. *Ibid.*) As to the right to possession of books, etc., on the bankruptcy of the agent, see *Re Burnand, ex p. Wilson*, [1904] 2 K. B. 68 ; 73 L. J. K. B. 413, C. A., and on the bankruptcy of the principal, *Re Ellis*, [1908] W. N. 215 ; 25 T. L. R. 38.

(*f*) *Harsant* v. *Blaine* (1887), 56 L. J. Q. B. 511, C. A. ; *Pearse* v. *Green* (1819), 1 Jac. & W. 135 ; *Edgell* v. *Day* (1865), L. R. 1 C. P. 80 ; 35 L. J. C. P. 7.

(*g*) *Burdick* v. *Garrick* (1870), L. R. 5 Ch. 233 ; 39 L. J. Ch. 369 ; *Power* v. *Power* (1884), L. R. 13 Ir. 281.

(*h*) *Gray* v. *Haig* (1854), 20 Beav. 219 ; *Jenkins* v. *Gould* (1827), 3 Russ. 385.

(*i*) *Lupton* v. *White* (1808), 15 Ves. 432.

(*k*) *Massey* v. *Banner* (1820), 1 Jac. & W. 241.

(*l*) *Harsant* v. *Blaine* (1887), 56 L. J. Q. B. 511, C. A. The Court may award interest on any debt or damages, under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3.

(*m*) *Beresford* v. *Driver* (1851), 14 Beav. 387 ; 20 L. J. Ch. 476.

(*n*) *Gibbon* v. *Pease*, [1905] 1 K. B. 810 ; 74 L. J. K. B. 502, C. A.

(*o*) *London School Board* v. *Northcliffe* (1889), Hudson's Building Contracts (4th ed.), vol. II, 147.

(*p*) *Leicestershire C. C.* v. *Michael Faraday & Partners*, [1941] 2 K. B. 205 ; 110 L. J. K. B. 511, C. A.

## Article 46

DUTY TO EXERCISE DUE SKILL, CARE AND DILIGENCE (*q*)

Every agent acting for reward is bound to exercise such skill, care and diligence in the performance of his undertaking as is usual or necessary in or for the ordinary or proper conduct of the profession or business in which he is employed, or is reasonably necessary for the proper performance of the duties undertaken by him (*r*).

Every agent acting gratuitously is bound to exercise such skill as he actually possesses, and such care and diligence as he would exercise in his own affairs (*s*) ; and, where he has held himself out to the principal as possessing skill adequate to the performance of the particular undertaking, such care and skill as is reasonably necessary for the performance thereof (*t*).

Every agent is bound to exercise reasonable care and diligence in protecting the moneys and property of his principal in his possession or custody, or under his control (*a*).

What is the usual or necessary, or a reasonable, degree of skill, care, or diligence, is a question of fact depending upon the nature of the agency, and the circumstances of the case.

*Illustrations*

1. A house agent is employed to let houses, and is paid a commission of 5 per cent. He is bound to use reasonable care to ascertain the solvency of the tenants (*b*).

2. An insurance broker undertakes to effect an insurance. He is bound to use due diligence to perform what he has undertaken within a reasonable

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(*q*) See also Article 58. The duty does not extend to parties other than the principal, unless the breach of it result in danger to life, limb or health : see *Old Gate Estates, Ltd.* v. *Toplis and Harding*, [1939] 3 All E. R. 209 ; *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491 ; 62 L. J. Q. B. 353, C. A. Nor does it apply where a person is appointed to determine a matter as arbitrator or quasi-arbitrator : *Pappa* v. *Rose* (1872), L. R. 7 C. P. 525 ; 41 L. J. C. P. 187, Ex. Ch. ; *Tharsis Sulphur Co.* v. *Loftus* (1872), L. R. 8 C. P. 1 ; 42 L. J. C. P. 6 ; *Finnegan* v. *Allen*, [1943] 1 K. B. 425 ; 112 L. J. K. B. 323, C. A. ; *Davis* v. *Tooth*, [1937] 4 All E. R. 118, P. C. See also §§ 379, 380, 381 of the American Restatement.

(*r*) *Beal* v. *South Devon Ry.* (1864), 3 H. & C. 337, Ex. Ch. ; *Solomon* v. *Barker* (1862), 2 F. & F. 726 ; *Harmer* v. *Cornelius* (1858), 5 C. B. (N.S.) 236. And see Illustrations 1 to 10, in all of which the agent was acting for reward ; and *Commonwealth Portland Cement Co.* v. *Weber*, [1905] A. C. 66 ; 74 L. J. P. C. 25, P. C. See also Article 57, Illustration 10.

(*s*) *Moffatt* v. *Bateman* (1869), L. R. 3 P. C. 115, P. C. ; *Wilson* v. *Brett* (1843), 12 L. J. Ex. 264 ; 63 R. R. 528. Illustrations 11 to 13. See also Article 57, Illustration 16.

(*t*) *Beal* v. *South Devon Ry.* (1864), 3 H. & C. 337, Ex. Ch. Illustration 13. See also Article 57, Illustration 16.

(*a*) *Massey* v. *Banner* (1820), 1 Jac. & W. 241 ; *Maltby* v. *Christie* (1795), 1 Esp. 340 ; *Reeve* v. *Palmer* (1859), 28 L. J. C. P. 168 ; 5 C. B. (N.S.) 84. Illustrations 11 to 13.

(*b*) *Hayes* (or *Heys*) v. *Tindall* (1861), 30 L. J. Q. B. 362 ; 1 B. & S. 296.

time (*c*) ; and where he is unable to effect the insurance according to the instructions, he must give notice to his principal of that fact (*d*).

3. An agent is employed to purchase a public-house. It is his duty to examine the takings, etc., and the fact that the principal has himself examined them on the advice of the agent does not exonerate him from liability for a breach of that duty (*e*).

4. An insurance broker is employed to insure from a particular point. It is his duty to insert in the policy all the clauses usually inserted in an insurance from that point (*f*).

5. A broker is employed on commission to purchase and ship scrap iron. He is not bound to inspect the iron for the purpose of ascertaining whether it is of the quality bought, because it is not part of a broker's ordinary business to inspect goods bought by him as such (*g*).

6. A share broker is employed to buy certain railway scrip. He buys on the market, in the ordinary course of business, what is usually sold as such scrip. He is not responsible to the principal because the scrip turns out not to be genuine, having had no notice that it was not genuine, and having bought it in the ordinary course of business (*h*).

7. An insurance broker retains in his own hands a policy effected by him. He is bound to use due diligence to procure a settlement and payment of a loss arising thereunder (*i*).

8. A person who acts as a patent agent is bound to know the law relating to the practice of obtaining patents, and is responsible to his principal for injury caused through his ignorance of such law (*k*).

9. A person who acts as a valuer of ecclesiastical property is bound to know the general rules applicable to the valuation of dilapidations ; but he is not expected to have an accurate and precise knowledge of the law relating thereto (*l*).

10. An estate agent who undertakes to value property on behalf of an intending mortgagee must possess the necessary experience and skill to enable him to value that particular property ; and if, being ignorant of the locality, he fail to make sufficient enquiry as to the values of properties in the neighbourhood, he is liable to his principal for all the damage caused by this neglect of duty ; so that where he values the property, and advises an advance, at too large a figure, he may become liable for the expenses of abortive sales, insurance premiums, builders' accounts for upkeep, mortgagees' expenses and disbursements, agents' commission upon an ultimate sale, and unpaid principal and interest (*m*).

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(*c*) *Turpin* v. *Bilton* (1843), 5 M. & G. 455 ; 12 L. J. C. P. 167.
(*d*) *Callander* v. *Oelricks* (1839), 8 L. J. C. P. 25 ; 5 Bing. N. C. 58 ; 50 R. R. 602.
(*e*) *Smith* v. *Barton* (1866), 15 L. T. 294.
(*f*) *Mallough* v. *Barber* (1815), 4 Camp. 150.
(*g*) *Zwilchenbart* v. *Alexander* (1860), 30 L. J. Q. B. 254 ; 1 B. & S. 234, Ex. Ch.
(*h*) *Lambert* v. *Heath* (1846), 15 M. & W. 486 ; *Mitchell* v. *Newhall* (1846), 15 L. J. Ex. 292 ; 15 M. & W. 308.
(*i*) *Bousfield* v. *Cresswell* (1810), 2 Camp. 545.
(*k*) *Lee* v. *Walker* (1872), L. R. 7 C. P. 121 ; 41 L. J. C. P. 91 ; *Lamphier* v. *Phipos* 1838), 8 C. & P. 475 ; *Parker* v. *Rolls* (1854), 14 C. B. 691.
(*l*) *Jenkins* v. *Betham* (1855), 24 L. J. C. P. 94 ; 15 C. B. 168.
(*m*) *Baxter* v. *F. W. Gapp & Co., Ltd.*, [1939] 2 K. B. 271 ; 108 L. J. K. B. 522, C. A.

11. A rides a horse gratuitously for the purpose of exhibiting it. He is bound to exercise such skill as he actually possesses, and is responsible to his principal for any injury caused by his neglect to do so (*n*).

12. A general merchant undertakes, without reward, to enter a parcel of A's goods with a parcel of his own. He enters both parcels, by mistake, under a wrong denomination, and the goods are seized. He is not responsible to A for the loss, having taken the same care of A's goods as of his own (*o*).

13. A offers, without reward, to lay out £700 in the purchase of an annuity, and undertakes to obtain good security. He is bound to use reasonable care to lay out the money securely (*p*).

## Article 47

DUTY TO PAY OVER MONEY RECEIVED TO USE OF PRINCIPAL

Subject to the provisions of Article 79, every agent who receives money to the use of his principal is bound to pay over or account for such money to the principal, notwithstanding claims made by third persons in respect thereof (*q*), even if the money were received in respect of a void (*r*) or illegal (*s*) transaction. Provided that, where money is obtained by an agent wrongfully, or is paid to him under a mistake of fact or for a consideration which fails, he may show that he has repaid it to the person who paid it to him (*t*) ; and where money is paid to him in respect of a voidable contract, he may show that the contract has been rescinded, and the money repaid, even where the contract was rescinded solely on the ground of his own fraud (*u*). Provided also, that no principal can enforce an unlawful transaction between himself and his agent (*a*).

Where an agent is appointed by two or more persons jointly, he is not bound to account to them separately (*b*) whatever may be the rights of the principals in respect of such money as between themselves ; but is not discharged unless he account to them all (*c*), except where the principals are partners (*d*). But an agent who has

(*n*) *Wilson* v. *Brett* (1843), 11 M. & W. 113 ; 12 L. J. Ex. 264.
(*o*) *Shiells* v. *Blackburne* (1789), 1 H. Bl. 159. And see *Bullen* v. *Swan Electric Engraving Co.* (1907), 23 T. L. R. 257, C. A. (bailee).
(*p*) *Whitehead* v. *Greetham* (1825), 2 Bing. 464, Ex. Ch.
(*q*) *Nickolson* v. *Knowles* (1820), 5 Madd. 47. Illustrations 1 and 2. See also *Eames* v. *Hacon* (1881), 18 Ch. D. 347 ; 50 L. J. Ch. 740, C. A.
(*r*) Illustration 5.
(*s*) Illustration 4.
(*t*) See Article 127.
(*u*) Illustration 6.
(*a*) Illustration 4.
(*b*) *Hatsall* v. *Griffith* (1834), 2 Cr. & M. 679 ; 3 L. J. Ex. 191 ; *Brown* v. *Bradford* (1842), 2 M. & Rob. 413 ; *Heath* v. *Chilton* (1844), 12 M. & W. 632 ; 13 L. J. Ex. 225.
(*c*) *Lee* v. *Sankey* (1872), L. R. 15 Eq. 204 ; *Innes* v. *Stephenson* (1831), 1 M. & Rob. 145 ; *Jones* v. *Cuthbertson* (1873), L. R. 8 Q. B. 504 ; 42 L. J. Q. B. 221, Ex. Ch. ; but see *Husband* v. *Davis* (1851), 10 C. B. 645 ; 20 L. J. C. P. 118.
(*d*) *Innes* v. *Stephenson*, *supra*.

been severally appointed by one person cannot refuse to account separately to him on the ground that others are jointly interested in the money in the agent's hands (*e*).

Every agent, in accounting for money received to the use of his principal, is entitled to take credit for all just allowances (*f*), and for any sums expended by him with the authority of the principal, even if they were expended for an unlawful purpose (*g*) ; but authority to deal with money in an unlawful manner may be revoked at any time before the money has been actually paid away (*h*).

*Illustrations*

1. A ship which is the property of A is transferred to B as security for a debt. B insures the ship for and on behalf of A & Co., and charges them with the premiums. The ship is lost, and B receives the insurance money. B must pay over the money, after deducting the amount of his debt, to A & Co., and cannot set up A's title, having insured for and on behalf of A & Co. (*i*). So, an insurance broker who receives money under a policy cannot dispute the claim of his principal on the ground that other persons are interested in the subject-matter of the insurance (*k*). A solicitor who has received money on behalf of his client must account to him therefor and cannot set up a *jus tertii* (*l*).

2. Money is paid to an agent on account of his principal, by a person who is indebted to the agent also. He must pay over the money to the principal, and is not entitled to appropriate it to his own debt (*m*).

3. A deposits bank notes with his banker, who sends them to the issuing bank and receives credit for the amount. That is equivalent to actual payment, and A's banker must account to A for the amount, though he never actually received payment of the notes, in consequence of the failure of the issuing bank (*n*).

4. An agent receives money on his principal's behalf under an illegal contract. The agent must account to the principal for the money, and cannot set up the illegality of the contract, which the other contracting party has waived by paying the money (*o*). Otherwise, if the contract of agency had been unlawful (*p*).

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(*e*) *Roberts* v. *Ogilby* (1821), 9 Price 269 ; *Suart* v. *Welch* (1839), 4 M. & C. 305 ; and see Article 48.

(*f*) *Dale* v. *Sollet* (1767), 4 Burr. 2133.

(*g*) *Bayntun* v. *Cattle* (1833), 1 M. & Rob. 265.

(*h*) *Bone* v. *Ekless* (1860), 29 L. J. Ex. 438 ; 5 H. & N. 925 ; *Taylor* v. *Bowers* (1876), 1 Q. B. D. 291 ; 45 L. J. Q. B 163, C. A.

(*i*) *Dixon* v. *Hamond* (1819), 2 B. & A. 310.

(*k*) *Roberts* v. *Ogilby* (1821), 9 Price 269.

(*l*) *Blaustein* v. *Maltz*, [1937] 2 K. B. 142 ; 106 L. J. K. B. 471, C. A.

(*m*) *Heath* v. *Chilton* (1844), 12 M. & W. 632 ; 13 L. J. Ex. 225 ; *Shaw* v. *Picton* (1825), 4 B. & C. 715.

(*n*) *Gillard* v. *Wise* (1826), 5 B. & C. 134. And see *Pollard* v. *Bank of England* (1871), L. R. 6 Q. B. 623 ; 40 L. J. Q. B. 233 ; *M'Carthy* v. *Colwin* (1839), 8 L. J. Q. B. 158 ; 9 A. & E. 607.

(*o*) *Bousfield* v. *Wilson* (1846), 16 L. J. Ex. 44 ; 16 M. & W. 185 ; *Farmer* v. *Russell* (1798), 1 B. & P. 296 ; *Tenant* v. *Elliott* (1797), 1 B. & P. 3.

(*p*) *Booth* v. *Hodgson* (1795), 6 T. R. 405.

5. A turf commission agent is employed to make bets. He must pay over to the principal the amount of any winnings actually received by him in respect of such bets, though the bets themselves are void by the Gaming Act, 1845, and though, in consequence of the provisions of the Gaming Act, 1892, he would not be able to recover from the principal the amount of any losses paid in respect of the bets (*q*).

6. An agent sells a horse and receives the purchase-money. The sale is subsequently rescinded on the ground of the agent's fraud, and the purchase-money is repaid. The agent is not liable to the principal for the amount of the purchase-money (*r*).

7. An insurance broker receives notice that the assured under a policy is entitled to the return of a portion of certain premiums held by the broker. The broker is entitled to deduct such portion in an action by the underwriters for the full premiums, if he act as agent for both parties (*s*).

8. A factor raises money by wrongfully pledging the goods of his principal. The principal may adopt the transaction, and treat the money raised as money had and received to his use (*t*).

## Article 48

### ESTOPPED FROM DENYING PRINCIPAL'S TITLE

Where a person is in possession of property as an agent, his possession, as evidence of title (*u*), and for the purpose of acquisition of title under a Statute of Limitations (*a*), is deemed to be the possession of the principal.

No agent is permitted to deny the title of his principal, or to set up the title of any third person in opposition to that of the principal, to any goods or chattels intrusted to him by, or which he has expressly or impliedly agreed to hold on behalf of, the principal (*b*). Provided, that where a third person is entitled to the goods or chattels as against the principal, and claims them from the agent, the agent may set up the title of that third person, if he does so on his behalf and by his authority, or if he has delivered up the goods or chattels to him, unless at the time when the goods or chattels were so intrusted to the agent, or when the agent so agreed to hold them on behalf of the principal, he had notice of the claim of such third person (*c*).

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(*q*) 8 & 9 Vict. c. 109 ; 55 & 56 Vict. c. 9 ; *De Mattos* v. *Benjamin* (1894), 63 L. J. Q. B. 248 ; *Bridger* v. *Savage* (1885), 15 Q. B. D. 363 ; 54 L. J. Q. B. 464, C. A. ; overruling *Beyer* v. *Adams* (1857), 26 L. J. Ch. 841. As to the Gaming Act, 1892, see Article 71.

(*r*) *Murray* v. *Mann* (1848), 2 Ex. 638 ; 17 L. J. Ex. 256.

(*s*) *Shee* v. *Clarkson* (1810), 12 East 507.

(*t*) *Bonzi* v. *Stewart* (1842), 5 Scott, N. R. 1, 26. See Article 31.

(*u*) *Hitchings* v. *Thompson* (1850), 5 Ex. 50 ; *Last* v. *Dinn* (1859), 28 L. J. Ex. 94.

(*a*) Illustrations 1 to 4 ; *Cooper* v. *De Tastet* (1829), Tamlyn 177.

(*b*) Illustrations 5 to 9 ; Article 47, Illustration 1 ; *Scott* v. *Crawford* (1842), 4 M. & G. 1031. See, however, Article 78.

(*c*) Illustrations 10 and 11 ; *Hunt* v. *Maniere* (1864), 34 L. J. Ch. 142.

No agent can acquire a title adverse to his principal unless he can show that the acts upon which he relies were done in respect of his title, and not of his agency (*d*).

The right to set up a *jus tertii* is limited to actions for the recovery of property bailed by the principal and to actions of that kind where the bailor has wrongfully, though not fraudulently, obtained the property bailed. It cannot be extended to an action by the principal to recover from the agent money held on his behalf by the agent (*e*).

*Illustrations*

1. An agent is permitted, for the convenient performance of his duties as such, to occupy premises belonging to his principal. The agent cannot acquire any estate therein, by reason of such occupation, even when he is permitted to use the premises for an independent business of his own (*f*).

2. A receives the rents of certain properties as an agent, and pays them into a separate account at his own bank. The principal dies intestate. A continues to receive the rents for more than twelve years after the death of the principal, stating to several of the tenants that he is acting for the heir, whoever he may be. Subsequently, within a reasonable time after the heir is ascertained, his assignee brings an action against A, claiming possession of the property and an account of the rents and profits. A claims the property as his own, and pleads the Statute of Limitations. The plaintiff is entitled to possession of the property, and an account of all the rents and profits received by A since the principal's death (*g*).

3. A solicitor paid off a mortgage debt due from a client, and entered into possession of the mortgaged property. Held : that he must be taken to have acted as the agent of the client, and therefore was not entitled to set up the Statute of Limitations in an action by the client for redemption (*h*).

4. A receives the rents of certain property as B's agent for more than twelve years, and duly pays them over to B. B thereby acquires a good prescriptive title to the property, in the absence of fraud, even if A were the true owner (*i*). Possession by an agent, as such, does not preserve his adverse rights (*i*).

5. A makes advances for the purpose of a mine, in order to obtain the ore, which he consigns to B for sale, B undertaking to account to him for the proceeds. B cannot set up any paramount title to the ore, or dispute A's right to the proceeds, on the ground that there are rights of third persons existing independently of the contract between A and B (*k*).

6. A buys goods on B's behalf, and delivers them to carriers at B's risk. A is estopped from disputing B's title to the goods (*l*).

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(*d*) *Att.-Gen.* v. *London Corporation* (1849), 19 L. J. Ch. 314 ; 2 Mac. & G. 247.
(*e*) *Blaustein* v. *Maltz*, [1937] 2 K. B. 142 ; 106 L. J. K. B. 471, C. A.
(*f*) *White* v. *Bayley* (1861), 30 L. J. C. P. 253 ; 10 C. B. (N.S.) 227.
(*g*) *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437 ; 59 L. J. Q. B. 268, H. L. And see *Smith* v. *Bennett* (1874), 30 L. T. 100.
(*h*) *Ward* v. *Carttar* (1865), L. R. 1 Eq. 29.
(*i*) *Williams* v. *Potts* (1871), L. R. 12 Eq. 149 ; 40 L. J. Ch. 775.
(*k*) *Zulueta* v. *Vinent* (1851), 1 De G. M. & G. 315.
(*l*) *Green* v. *Maitland* (1842), 4 Beav. 524.

7. A warehouseman or wharfinger is an agent for the person in whose name he holds, or on whose behalf he has undertaken to hold, goods, and is not permitted to set up the title of any other person (*m*). The servant of a wharfinger gives a receipt for goods, in which there is an undertaking to deliver the goods to A. The wharfinger will not be permitted to deny A's title to the goods on their arrival (*n*).

8. A warehouseman agrees to hold goods, described in a delivery order, on behalf of the transferee of such order. In an action by the transferee against the warehouseman for conversion of the goods, it is no defence that the goods in question were not separated from the bulk, and that therefore the property in the goods had not passed to the plaintiff (*o*).

9. A delivers goods to a carrier, consigned to B. The property in the goods has not, in fact, passed to B. A countermands his instructions, and the carrier re-delivers the goods to him. The carrier may set up A's title, in an action by B, carriers not being, as such, agents of their consignees (*p*).

10. A wrongfully distrains B's goods and delivers them to C, an auctioneer, for sale, C having at the time no knowledge of B's adverse claim. B subsequently gives notice of his title to C, and claims the proceeds. C may set up the title of B, in an action by A for the proceeds, provided that he defends on B's behalf and with his authority (*q*).

11. A sells goods as B's agent, having at the time when the goods are intrusted to him notice that C claims them. A cannot, in an action by B for the proceeds, set up the title of C, even where C was wrongfully deprived of the goods by B, A having elected to act as B's agent for the sale of the goods after receiving notice of C's adverse claim (*r*).

## *DUTIES ARISING FROM THE FIDUCIARY CHARACTER OF THE RELATIONSHIP*

### Article 49

DUTY TO MAKE FULL DISCLOSURE WHERE ANY PERSONAL INTEREST

No agent is permitted to enter, as such, into any transaction in which he has a personal interest in conflict with his duty to his principal, unless the principal, with a full knowledge of all the material circumstances, and of the exact nature and extent

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(*m*) *Betteley* v. *Reed* (1843), 4 Q. B. 511 ; 12 L. J. Q. B. 172 ; *Holl* v. *Griffin* (1833), 3 L. J. C. P. 17 ; 10 Bing. 246 ; *Gosling* v. *Birnie* (1831), 7 Bing. 339 ; *Henderson* v. *Williams*, [1895] 1 Q. B. 521 ; 64 L. J. Q. B. 308, C. A. See also *Heskell* v. *Continental Express*, [1950] 1 All E. R. 1033.

(*n*) *Evans* v. *Nichol* (1841), 4 Scott, N. R. 43. And see *Wood* v. *Tassell* (1844), 6 Q. B. 234.

(*o*) *Woodley* v. *Coventry* (1863), 32 L. J. Ex. 185 ; *Stonard* v. *Dunkin* (1810), 2 Camp. 344.

(*p*) *Sheridan* v. *New Quay Co.* (1858), 28 L. J. C. P. 58 ; 4 C. B. (N.S.) 618.

(*q*) *Biddle* v. *Bond* (1865), 34 L. J. Q. B. 137 ; 6 B. & S. 225 ; *Ross* v. *Edwards* (1895), 73 L. T. 100, P. C. ; *Rogers* v. *Lambert*, [1891] 1 Q. B. 318 ; 60 L. J. Q. B. 187, C. A. ; *Thorne* v. *Tilbury* (1858), 27 L. J. Ex. 407 ; 3 H. & N. 534.

(*r*) *Re Sadler, ex p. Davies* (1881), 19 Ch. D. 86, C. A.

of the agent's interest, consent (*s*). Where any transaction is entered into in violation of this rule, the principal, when the circumstances come to his knowledge, may repudiate the transaction, or may affirm it and recover from the agent any profit made by him in respect thereof (*t*).

Every custom or usage which converts an agent into a principal, or otherwise gives him an interest at variance with his duty, is unreasonable, and no such custom or usage is binding on any principal who has no notice thereof (*u*).

No agent for the sale of property is permitted to purchase it himself, and no agent to purchase is permitted to buy his own property on the principal's behalf, unless he make full disclosure to the principal ; and the fact that he pays or charges a fair price is immaterial (*a*).

Where an agent for sale takes any interest in a purchase negotiated by him, he must fully disclose all the material facts, and the exact nature and extent of his interest. It is not sufficient merely to disclose that he has an interest, or to make such statements as would put the principal on inquiry. The burden of proving full disclosure lies on the agent (*b*).

If an agent omits to confess or disclose a misdoing to his principal, this omission is not in itself a breach of the contract between principal and agent (*c*). This principle has been approved by the House of Lords, who have held that in the absence of fraud a company director is not bound to disclose to the company breaches of his obligation arising out of the relationship so as to give the company the opportunity of dismissing him (*d*).

*Illustrations*

1. A stockbroker was employed to purchase certain shares. He purchased the shares from his own trustee without informing the principal of the fact. The transaction was set aside, after an interval of many years, without inquiry whether a fair price was charged or not (*e*). Lapse of time is no bar to the action, so long as the principal remains, without any fault on his part, in ignorance of the fraud (*f*).

2. It is the duty of a director to promote the interests of the company, and he is not permitted to enter into engagements in which his own interest is in

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(*s*) *Rothschild* v. *Brookman* (1831), 2 Dow. & Cl. 1888, H. L. ; *Parker* v. *McKenna* (1874), L. R. 10 Ch. 96 ; 44 L. J. Ch. 425 ; *Gardner* v. *McCutcheon* (1842), 4 Beav. 534 ; *East India Co.* v. *Henchman* (1791), 1 Ves. jun. 289 ; *Re Birt*, *Birt* v. *Burt* (1883), 22 Ch. D. 604 ; 52 L. J. Ch. 397 ; *Tiessen* v. *Henderson*, [1899] 1 Ch. 861 ; 68 L. J. Ch. 353. See §§ 381, 389 of the American Restatement.

(*t*) *Rothschild* v. *Brookman*, *supra* ; *Bentley* v. *Craven* (1853), 18 Beav. 75 ; *Burton* v. *Wookey* (1822), 6 Madd. 367. And see Articles 51, 54 and 68.

(*u*) *Robinson* v. *Mollett* (1874), L. R. 7 H. L. 802 ; 44 L. J. C. P. 362, H. L. See however, Article 70 ; Illustration 13.

(*a*) *Lowther* v. *Lowther* (1806), 13 Ves. 95, 102 ; *Massey* v. *Davies* (1794), 2 Ves. jun. 317 ; *Bentley* v. *Craven* (1853), 18 Beav. 75 ; *Rothschild* v. *Brookman* (1831), 2 Dow. & Cl. 188, H. L.

(*b*) *Dunne* v. *English* (1874), L. R. 18 Eq. 524.

(*c*) *Healey* v. *Société Anonyme Francaise Rubastic*, [1917] 1 K. B. 946 at 947.

(*d*) *Bell* v. *Lever Brothers, Ltd.*, [1932] A. C. 161 ; 101 L. J. K. B. 129, H. L.

(*e*) *Gillett* v. *Peppercorne* (1840), 3 Beav. 78 ; *King* v. *Howell* (1910), 27 T. L. R. 114, C. A. ; *Armstrong* v. *Jackson*, [1917] 2 K. B. 822 ; 86 L. J. K. B. 1375.

(*f*) *Oelkers* v. *Ellis*, [1914] 2 K. B. 139 ; 83 L. J. K. B. 658.

conflict with that duty (*g*). A director of a company enters into a contract on behalf of the company with a firm of which he is a member. The contract is voidable in equity by the company, quite apart from the question of its fairness or unfairness (*g*).

3. A solicitor entered into an arrangement under which he was to receive a share of certain property, and also a share of the profit arising from its sale. He subsequently acted as solicitor in purchasing a large portion of the property, without disclosing his interest therein to the client for whom he so acted. Held, that he was a trustee for the client of a proportionate part of the share taken by him, and that he must account for the full amount of the profit made by him upon the sale, with interest at the rate of 5 per cent. (*h*).

4. An auctioneer, who was employed to sell an estate, purchased it himself. The transaction was set aside, after an interval of thirteen years (*i*). So, an agent of a trustee for sale or of a mortgagee selling under his power of sale, who is employed as agent in the matter of the sale (*k*), cannot purchase the property sold (*l*) ; and a solicitor who conducts a sale of property must not purchase it without a full explanation to the vendor (*m*). But an auctioneer is not deemed to be an agent of the purchaser at a sale by auction, for this purpose, and may (probably) sell his own property at such a sale without disclosing that he is the owner (*n*).

5. A broker is employed to sell goods. He sells them ostensibly to A, really to A and himself jointly. While the goods are still in the possession of the broker, he becomes bankrupt, A also being insolvent. The principal may repudiate the contract and recover the goods specifically from the trustee in bankruptcy of the broker (*o*).

6. A firm of brokers were authorised to purchase goods. They delivered bought notes to the principal, which purported to be notes of a contract of which the brokers guaranteed performance, but which did not disclose the sellers. The principal paid the brokers their commission and a deposit, and subsequently discovered that one of the brokers intended to perform the contract himself. The principal was held to be entitled to repudiate the contract, and the brokers were ordered to repay the deposit and commission, with interest (*p*). No agent can become a principal and deal on that footing without full and fair disclosure (*q*).

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(*g*) *Aberdeen Ry.* v. *Blakie* (1854), 2 Eq. R. 1281, H. L. See also *Transvaal Lands Co.* v. *New Belgium, etc., Co.*, [1914] 2 Ch. 488 ; 84 L. J. Ch. 94, C. A. ; *Re Thomson*, [1930] 1 Ch. 203 ; 99 L. J. Ch. 156; *Regal (Hastings)* v. *Gulliver*, [1942] 1 All E. R. 378.

(*h*) *Tyrrell* v. *Bank of London* (1862), 10 H. L. Cas. 26 ; 31 L. J. Ch. 369.

(*i*) *Oliver* v. *Court* (1820), Dan. 301.

(*k*) See *Nutt* v. *Easton*, [1900] 1 Ch. 29 ; 69 L. J. Ch. 46, C. A.

(*l*) *Whitcomb* v. *Minchin* (1820), 5 Madd. 91 ; *Martinson* v. *Clowes* (1882), 21 Ch. D. 857 ; 51 L. J. Ch. 594 ; *Lawrance* v. *Galsworthy* (1857), 3 Jur. (N.S.) 1049.

(*m*) *Re Bloye's Trust* (1849), 19 L. J. Ch. 89 ; 1 Mac. & Gr. 488 ; *Ex p. James* (1803), 8 Ves. 337.

(*n*) *Flint* v. *Woodin* (1852), 9 Hare 618.

(*o*) *Ex p. Huth, re Pemberton* (1840), 4 Dea. 294.

(*p*) *Wilson* v. *Short* (1847), 17 L. J. Ch. 289 ; 6 Hare 366.

(*q*) *Ibid.* ; *Williamson* v. *Barbour* (1877), 9 Ch. D. 529 ; 50 L. J. Ch. 147 ; *Robinson* v. *Mollett* (1874), L. R. 7 H. L. 802 ; 44 L. J. C. P. 362, H. L. ; Article 71, Illustration 12. Cf. *Ellis & Co.'s Trustee* v. *Watsham* (1923), 155 L. T. Jo. 363 (" bought of ourselves as principals "—held sufficient disclosure).

7. An agent for sale sells to a company of which he is a director and large shareholder. The sale is not binding on the principal (*r*).

8. A director of a railway company purchased, on the company's behalf, the concession of a line of which he was the concealed owner. Held, that the company might repudiate the transaction (*s*). So, where a director sold a vessel to his company as from a stranger, it was held that he must account to the company for the profit made by him, with interest (*t*). In such cases, the principal may rescind the transaction, or may affirm it and claim the profit made, at his option (*u*).

9. *Special customs inconsistent with this Article are unreasonable.*—A broker is authorised to sell certain shares, and pay himself certain advances out of the proceeds. A custom whereby he may himself take over the shares at the price of the day, in the event of his being unable to find a purchaser at an adequate price, is unreasonable, and such a transaction is not binding on the principal unless he had notice of the custom at the time when he gave the broker the authority, even if a forced sale of the shares would inevitably have realised less than the price given by the broker (*a*). So, a custom whereby an agent for sale may purchase at the minimum price if he cannot find a purchaser is unreasonable (*b*).

## Article 50

AGENT PURCHASING PROPERTY BECOMES A TRUSTEE

Where an agent who is employed to purchase property on behalf of his principal, purchases it in his own name or on his own behalf, and it is conveyed or transferred to him, he becomes a trustee thereof for the principal (*c*).

## Article 51

DUTY TO MAKE FULL DISCLOSURE WHERE HE DEALS WITH THE PRINCIPAL

Where an agent enters into any contract or transaction with his principal, or with his principal's representative in interest, he must act with perfect good faith, and make full disclosure of all the material circumstances, and of everything known to him respecting the subject-matter of the contract or transaction which

(*r*) *Salomans* v. *Pender* (1865), 34 L. J. Ex. 95 ; 3 H. & C. 639.
(*s*) *Gt. Luxembourg Ry.* v. *Magnay* (1858), 25 Beav. 586.
(*t*) *Benson* v. *Heathorn* (1842), 1 Y. & Coll. C. C. 326.
(*u*) *Re Cape Breton Co.* (1884), 26 Ch. D. 221 ; 29 Ch. D. 795, C. A. ; *Cavendish Bentinck* v. *Fenn* (1887), 12 App. Cas. 652, H. L. ; *Tiessen* v. *Henderson*, [1899] 1 Ch. 861 ; 68 L. J. Ch. 353 ; *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate*, [1899] 2 Ch. 392 ; 68 L. J. Ch. 699, C. A. And see Article 54.
(*a*) *Hamilton* v. *Young* (1881), 7 L. R. Ir. 289 ; *Rothschild* v. *Brookman* (1831), 2 Dow & Cl. 188 ; 30 R. R. 147 H. L. See, however, Article 70, Illustration 13.
(*b*) *De Bussche* v. *Alt* (1877), 8 Ch. D. 286 ; 47 L. J. Ch. 381, C. A.
(*c*) *Lees* v. *Nuttall* (1834), 2 Myl. & K. 819 ; *Austin* v. *Chambers* (1837), 6 Cl. & F. 1, H. L. ; *Bartlett* v. *Pickersgill*, 1 Cox 15 ; *James* v. *Smith*, [1891] 1 Ch. 384. See also *Taylor* v. *Salmon* (1838), 4 Myl. & Cr. 139.

would be likely to influence the conduct of the principal or his representative (*d*).

Where any question arises as to the validity of any such contract or transaction, or of any gift made by a principal to his agent, the burden of proving that no advantage was taken by the agent of his position, or of the confidence reposed in him, and that the transaction was entered into in perfectly good faith and after full disclosure, lies upon the agent (*d*).

Where a principal or his representative seeks to set aside any such contract or transaction, on the ground of want of disclosure or good faith, he must take proceedings for that purpose within a reasonable time after the circumstances he relies upon become known to him (*e*).

*Gifts to agents.*—The general rule is that a gift *inter vivos* from principal to agent is valid if the agent prove that there was no undue influence on his part (*f*), but this principle does not apply where the relationship is that of solicitor and client, nor of counsel and lay client (*g*).

A solicitor is not permitted to bargain with his client for any benefit beyond the amount of his legal remuneration, and during the time he is acting as solicitor for the client, he is incapable of accepting any gift or reward besides such remuneration, even where there is no suspicion of any fraud, misrepresentation or undue influence (*h*).

*Illustrations*

1. A agreed with B that A would furnish B with particulars of houses which A might think suitable for purchase by B. A, having found a suitable house, procured C to purchase it for £2,000, the purchase-money being provided by A ; and thereupon purported to buy it from C for £4,500. A then informed B that he had purchased the house for £4,500, and offered it to B for £5,000, representing that this price would allow a profit to A of £500. B purchased the house from A for £5,000. Held, that A was the agent of B for the purpose of furnishing particulars of suitable houses ; that though an agent might terminate the relationship of principal and agent by selling to his

(*d*) *Molony* v. *Kernan* (1842), 2 Dr. & War. 31 ; *Waters* v. *Shaftesbury* (1866), 14 L. T. 184 ; *Charter* v. *Trevelyan* (1842), 11 Cl. & F. 714, H. L. ; *Savery* v. *King* (1856), 5 H. L. Cas. 627 ; 25 L. J. Ch. 482, H. L. ; *Ward* v. *Sharp* (1883), 53 L. J. Ch. 313 ; *Jones* v. *Thomas* (1837), 2 Y. & Coll. 498 ; *Consett* v. *Bell* (1841), 1 Y. & Coll. C. C. 569 ; *Collins* v. *Hare* (1828), 2 Bli. (N.S.) 106, H. L. ; *Demerara Bauxite Co.* v. *Hubbard*, [1923] A. C. 673 ; 92 L. J. P. C. 148. And see Illustrations. See §§ 389 to 392 of the American Restatement.

(*e*) Illustration 12. *De Montmorency* v. *Devereux* (1840), 7 Cl. & F. 188, H. L. ; *Champion* v. *Rigby* (1830), 1 Russ. & M. 539 ; *Clanricarde* v. *Henning* (1860), 30 L. J. Ch. 865 ; 30 Beav. 175 ; *Lyddon* v. *Moss* (1859), 4 De G. & J. 104 ; *Flint* v. *Woodin* (1852), 9 Hare 618.

(*f*) *Hunter* v. *Atkins* (1832), 3 Myl. & K. 113.

(*g*) *Broun* v. *Kennedy* (1864), 33 L. J. Ch. 342 ; 4 De G. J. & S. 217.

(*h*) *Morgan* v. *Minnett* (1877), 6 Ch. D. 638 ; *O'Brien* v. *Lewis* (1863), 32 L. J. Ch. 569 ; *Wright* v. *Proud* (1806), 13 Ves. 138 ; *Tomson* v. *Judge* (1855), 24 L. J. Ch. 785 ; 3 Drew. 306 ; *Middleton* v. *Welles* (1785), 4 Bro. P. C. 245, H. L. ; *Saunderson* v. *Glass* (1742), 2 Atk. 297 ; *Wright* v. *Carter*, [1903] 1 Ch. 27 ; 72 L. J. Ch. 138, C. A. Comp. *Re Haslam*, [1902] 1 Ch. 765 ; 71 L. J. Ch. 734, C. A.

principal property which belonged to himself, it was his duty to act honestly and faithfully, and, if he concealed material facts, obtaining an unfair advantage by fraud, the relationship was not terminated by such a transaction ; and that A, having concealed the true nature of the transaction by fraud, was liable to account to B for all profits obtained by A without B's knowledge and consent (*i*).

2. A manager of a bank, who was permitted to carry on a separate business on his own account, lent money from the bank for the purposes of such business, upon the security of bills which he had not indorsed. The drawers and acceptors of the bills became insolvent. Held, that the manager was bound to make good the loss. He ought not to have granted himself any accommodation nor acquired any personal benefit in the course of his agency, without disclosing all the circumstances to the directors of the bank (*k*).

3. An agent for the management of trust property purchases part of such property from the *cestui que trust*. The agent, to support the transaction, must show not only that he gave full value, but also that he dealt at arm's length, and fully disclosed everything known to him which tended to enhance the value of the property (*l*).

4. A steward contracts with his employer for a lease. He must show that he is giving as high a rent as it would have been his duty to obtain from a third person, and that his employer was fully informed of every circumstance affecting the value of the property which was, or ought to have been, within the steward's knowledge (*m*).

5. An agent for the vendor of property is precluded from contracting with the purchaser for the payment of commission, unless he make full disclosure to both and a custom of the trade that the agent shall have double brokerage is unreasonable and will not be enforced (*n*).

6. A director proposes to contract with his company, it being provided by the articles of association that directors may contract with the company on disclosing their interest. It is his duty to declare the full extent and exact nature of his interest (*o*). By the Companies Act, 1948, s. 199, it is the duty of a director of a company, who is in any way, whether directly or indirectly, interested in any contract or proposed contract with the company, to declare the nature of his interest at a meeting of the directors of the company, and a director who fails to comply with this enactment is liable to a fine not exceeding £100 ; but it is sufficient to give a general notice to the directors that the director interested is a member of a specified company or firm and is to be regarded as interested in any contract to be made with them. The section is not to prejudice the operation of any rule of law restricting directors from having any interest in contracts with the company.

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(*i*) *Regier* v. *Campbell-Stuart*, [1939] Ch. 766 ; 108 L. J. Ch. 321.
(*k*) *Gwatkin* v. *Campbell* (1854), 1 Jur. (N.S.) 131.
(*l*) *King* v. *Anderson* (1874), 8 Ir. R. Eq. 147. And see *Dally* v. *Wonham* (1863), 32 L. J. Ch. 790 ; 33 Beav. 154.
(*m*) *Selsey* v. *Rhoades* (1824), 2 S. & S. 41 ; *Watt* v. *Grove* (1805), 2 Sch. & Lef. 492.
(*n*) *Fullwood* v. *Hurley*, [1928] 1 K. B. 498 ; 96 L. J. K. B. 976, C. A.
(*o*) *Imperial Mercantile Credit Co.* v. *Coleman* (1873), L. R. 6 H. L. 189 ; 42 L. J. Ch. 644, H. L. ; *Gluckstein* v. *Barnes*, [1900] A. C. 240 ; 69 L. J. Ch. 385, H. L. Comp. *Chesterfield Colliery Co.* v. *Black* (1878), 37 L. T. 740.

7. A director of a railway company contracted with the company to take refreshment rooms. The Court refused to decree specific performance of the contract against the company (*p*).

8. A bill to set aside the purchase of property by an agent was dismissed, with costs, on proof that the principal had distinct notice, at the time of the transaction, that the agent was one of the beneficial purchasers, no proceedings having been taken to set it aside for more than six years, and the property having advanced in value in the meantime (*q*).

*Solicitor and Client*

9. A solicitor purchases property from his client's trustee in bankruptcy. He must make a full disclosure of all the knowledge acquired by him respecting such property during the time when he was acting as solicitor for the bankrupt (*r*).

10. A solicitor purchased property from a former client, and concealed a material fact. The transaction was set aside, although there was another solicitor acting on behalf of the plaintiff (*s*). But the rule that an agent must disclose knowledge acquired by him as such, does not, in general, apply where the agent has ceased to act, and there is another agent, with equal means of knowledge, acting for the principal in the transaction (*t*).

11. A Scottish attorney purchases his principal's property in the name of a third person. The transaction will be set aside without inquiry as to the adequacy of the price. An agent may purchase property from his principal, provided he deal at arm's length, and fully disclose all that he knows respecting the property ; but if any underhand dealing or concealment appear, the transaction will be set aside on the application of the principal (*u*).

12. If a solicitor take a mortgage from his client, the Court will not enforce any unusual stipulations in the mortgage disadvantageous to the client (*a*), and will restrain the solicitor from exercising his rights as mortgagee in an unfair or inequitable manner (*b*). Where a power of sale exercisable at any time was inserted in such a mortgage without the usual proviso requiring interest to be in arrear or notice to be given, and the solicitor sold the property under the power, he was held liable to the client in damages as for an improper sale, it not being shown that he had explained to the client the unusual nature of the power (*c*).

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(*p*) *Flanagan* v. *G. W. Ry.* (1868), 19 L. T. 345.

(*q*) *Wentworth* v. *Lloyd* (1864), 10 H. L. Cas. 589, H. L. Comp. *De Bussche* v. *Alt* (1877), 8 Ch. D. 286, C. A. ; *Savery* v. *King* (1856), 5 H. L. Cas. 627.

(*r*) *Luddy's Trustees* v. *Peard* (1886), 33 Ch. D. 500 ; 55 L. J. Ch. 884. And see *Boswell* v. *Coaks* (1884), 27 Ch. D. 424, C. A. ; 11 App. Cas. 232, H. L.

(*s*) *Gibbs* v. *Daniel* (1862), 4 Giff. 1.

(*t*) *Scott* v. *Dunbar* (1828), 1 Moll. 442. And see *Edwards* v. *Meyrick* (1842), 2 Hare 60 ; *Montesquieu* v. *Sandys* (1811), 18 Ves. 302.

(*u*) *McPherson* v. *Watt* (1877), 3 App. Cas. 254, H. L. ; *Lewis* v. *Hillman* (1852), 3 H. L. Cas. 607, H. L. ; *Cane* v. *Allen* (1814), 2 Dow. 289, H. L. ; *Uppington* v. *Bullen* (1842), 2 Dr. & War. 184. In *Murphy* v. *O'Shea* (1845), 8 Ir. Eq. Rep. 329, and *Crowe* v. *Ballard* (1790), 2 Cox 253, the agent was not a solicitor.

(*a*) *Cowdry* v. *Day* (1859), 29 L. J. Ch. 39 ; 1 Giff. 316 ; *Eyre* v. *Hughes* (1876), 2 Ch. D. 148 ; 45 L. J. Ch. 395.

(*b*) *Macleod* v. *Jones* (1883), 24 Ch. D. 289 ; 53 L. J. Ch. 145, C. A. ; *Pearson* v. *Benson* (1860), 28 Beav. 598.

(*c*) *Readdy* v. *Prendergast* (1887), 56 L. T. 790, C. A. ; *Cockburn* v. *Edwards* (1881), 18 Ch. D. 449 ; 51 L. J. Ch. 46, C. A. ; *Craddock* v. *Rogers* (1884), 53 L. J. Ch. 968, C.A. Comp. *Pooley* v. *Whetham* (1886), 2 T. L. R. 808, C. A.

13. A solicitor who purchases property from his client must show that the price was adequate, that he took no advantage of his position, and that the sale was as advantageous to the client as any that the solicitor could have obtained, with the exercise of due diligence, from a third person (*d*).

*Gifts to Agents*

14. A client, who had recovered certain property after protracted litigation, shortly afterwards conveyed, by deed of gift, a valuable portion of such property to the counsel engaged on his behalf, in consideration of services, etc., rendered in connection with its recovery. The deed was set aside on the ground of want of independent advice (*e*). So, where a client settled property in trust for himself for life, and then for his niece, who was the wife of his solicitor, for her separate use, the deed was set aside, on the ground that the client had not had independent advice (*f*).

15. The executor of a deceased client was held to be entitled to have a gift from the deceased to her solicitor set aside, although the deceased, after the confidential relationship had ceased, had expressed her intention to abide by the gift, the circumstances not being such as would have debarred her, at the time of her death, from having it set aside (*g*). This principle does not, however, apply to gifts by will (*h*).

## Article 52

### MUST NOT USE MATERIAL OR INFORMATION ACQUIRED IN COURSE OF AGENCY

No agent is permitted, unless with the consent of his principal, either during or after the termination of the agency, to make use in any manner prejudicial to the interests of the principal, of any materials or information acquired in the course of the agency (*i*).

This principle was recently applied to a case in which a trade union official sent questionnaires to members of the union who were employees of brewery companies ; the answers to some of the questions would have involved the disclosure of information acquired by the employees in the course of and as

(*d*) *Savery* v. *King* (1856), 5 H. L. Cas. 627 ; 25 L. J. Ch. 482 ; *Pisani* v. *Gibraltar* (1874), L. R. 5 P. C. 516, P. C. ; *Spencer* v. *Topham* (1856), 22 Beav. 573 ; *Gibson* v. *Jeyes* (1801), 6 Ves. 266 ; *Holman* v. *Loynes* (1854), 23 L. J. Ch. 529 ; 4 De G. M. & G. 270 ; *Gresley* v. *Mousley* (1862), 31 L. J. Ch. 537 ; *Wright* v. *Carter*, [1903] 1 Ch. 27 ; 72 L. J. Ch. 138, C. A. ; *Moody* v. *Cox*, [1917] 2 Ch. 71 ; 86 L. J. Ch. 424, C. A.

(*e*) *Broun* v. *Kennedy* (1864), 33 L. J. Ch. 342 ; 4 De G. J. & S. 217 ; *Rhodes* v. *Bate* (1865), L. R. 1 Ch. 252 ; 35 L. J. Ch. 267.

(*f*) *Liles* v. *Terry*, [1895] 2 Q. B. 679 ; 65 L. J. Q. B. 34, C. A. See also *Lloyd* v. *Coote*, [1915] 1 K. B. 242 ; 84 L. J. K. B. 567.

(*g*) *Tyars* v. *Alsop* (1888), 59 L. T. 367, C. A.

(*h*) *Parfitt* v. *Lawless* (1872), L. R. 2 P. 462 ; 41 L. J. P. 68 ; *Walker* v. *Smith* (1861), 29 Beav. 394 ; *Hindson* v. *Weatherill* (1854), 23 L. J. Ch. 820 ; 5 De G. M. & G. 301 ; *Barry* v. *Butlin* (1838), 2 Moo. P. C. 480, P. C.

(*i*) *Robb* v. *Green*, [1895] 2 Q. B. 315 ; 64 L. J. Q. B. 593, C. A. ; *Louis* v. *Smellie* (1895), 73 L. T. 266, C. A. ; *Lamb* v. *Evans*, [1893] 1 Ch. 218 ; 62 L. J. Ch. 404, C. A. ; *Liverpool Victoria, etc., Socy.* v. *Houston* (1901), 3 F. 42 ; *Kirchner* v. *Gruban*, [1909] 1 Ch. 413 ; 78 L. J. Ch. 117 ; *Amber Size, etc., Co.* v. *Menzel*, [1913] 2 Ch. 239 ; 82 L. J. Ch. 573. See §§ 393 to 396 of the American Restatement.

a result of their employment. It was held that apart from any express term, the employee was under an obligation not to disclose the information (*k*).

## Article 53

### DUTY TO ACCOUNT IN EQUITY

It is the duty of every agent to render just and true accounts of his agency to the principal, and in cases of general agency of a fiduciary character the principal has a right to have an account taken in a Court of equity (*l*). In the case of a single agency transaction untainted with fraud (*m*), or where the agency is not of a fiduciary character, the agent is not bound to render an account in a Court of equity, unless the accounts are so complicated that they cannot be properly investigated in an action at law (*n*).

Settled accounts will not be re-opened (*o*), unless the agent has been guilty of fraud or undue influence, but the principal may be given leave to surcharge and falsify them (*p*). Where the agent has been guilty of fraud (*q*), or the accounts have been settled under undue influence (*r*), his accounts will be re-opened from the commencement of the agency, and in such a case lapse of time does not constitute a defence (*q*).

The illegality of a transaction entered into by an agent is not a bar to an action by the principal for an account thereof (*s*), unless the contract of agency is itself illegal (*t*).

The maxim *ex turpi causa, non oritur actio* applies as between principal and agent ; and where the principal has paid money to the agent in pursuance of an agreement between them that the agent shall apply it to an illegal purpose, the principal cannot

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(*k*) *Bent's Brewery Co.* v. *Hogan*, [1945] 2 All E. R. 570.

(*l*) *Makepeace* v. *Rogers* (1865), 34 L. J. Ch. 396 ; 4 De G. J. & S. 649 ; *Hemings* v. *Pugh* (1863), 4 Giff. 456 ; *Bowles* v. *Orr* (1835), 1 Y. & Coll. 464 ; *Finch* v. *Burden* (1865), 12 L. T. 302.

(*m*) *Navulshaw* v. *Brownrigg* (1852), 21 L. J. Ch. 908 ; 2 De G. M. & G. 441 ; *Phillips* v. *Phillips* (1852), 22 L. J. Ch. 141 ; 9 Hare 471.

(*n*) *Barry* v. *Stevens* (1862), 31 L. J. Ch. 785 ; 31 Beav. 258 ; *Hemings* v. *Pugh* (1863), 4 Giff. 456 ; *King* v. *Rossett* (1827), 2 Y. & J. 33 ; *Blyth* v. *Whiffin* (1872), 27 L. T. 330.

(*o*) *M'Kellar* v. *Wallace* (1853), 5 Moo. Ind. App. 372, P. C. ; *Parkinson* v. *Hanbury* (1867), L. R. 2 H. L. 1 ; 36 L. J. Ch. 293.

(*p*) *Hunter* v. *Belcher* (1864), 2 De G. J. & S. 194 ; *Mozeley* v. *Cowie* (1877), 47 L. J. Ch. 271.

(*q*) *Beaumont* v. *Boultbee* (1802), 5 Ves. 485 ; 7 Ves. 599 ; *Clarke* v. *Tipping* (1846), 9 Beav. 284 ; *Middleditch* v. *Sharland* (1799), 5 Ves. 87 ; *Hardwicke* v. *Vernon* (1808), 14 Ves. 504 ; 9 R. R. 329 ; *Walsham* v. *Stainton* (1863), 12 W. R. 63.

(*r*) *Watson* v. *Rodwell* (1879), 11 Ch. D. 150 ; 48 L. J. Ch. 209, C. A. ; *Coleman* v. *Mellersh* (1850), 2 Mac. & G. 309 ; *Lewes* v. *Morgan* (1817), 5 Price 42 ; *Jones* v. *Moffett* (1846), 3 J. & L. 636 ; *Ward* v. *Sharp* (1883), 53 L. J. Ch. 313.

(*s*) *Sharp* v. *Taylor* (1850), 2 Ph. 801 ; 78 R. R. 298 ; *Williams* v. *Trye* (1854), 23 L. J. Ch. 860.

(*t*) *Knowles* v. *Haughton* (1805), 11 Ves. 168 ; *Battersby* v. *Smyth* (1818), 3 Madd. 110 ; *Sykes* v. *Beadon* (1879), 11 Ch. D. 170.

recover the money, after the time agreed for performance by the agent has passed, even though the agent has converted the money to his own use (*u*).

The right of a principal to have an account taken in equity rests upon the trust and confidence reposed in the agent (*a*), and in all cases of general agency, the fiduciary character of the relationship is sufficient to support an action for an account, whether the accounts be complicated or not, and even if the receipts and payments be all on the one side (*b*). Thus, where an agent is employed to sell property, he may be compelled to account in equity for the proceeds (*c*). But the bare relationship of principal and agent is not sufficient, in the absence of fraud, where the agent is not employed in a fiduciary capacity, and the transaction can be fairly and properly investigated in a common law action (*d*). Thus, bankers are not bound to account in equity to their customers, unless the accounts in question are intricate and complicated (*e*). So, it was held that a person who was occasionally employed as a clerk by a solicitor was not bound to account in equity, though there had been mutual receipts and payments (*f*). Damages for neglect of duty cannot be passed in taking an account, the proper remedy for such damages being an action at law (*g*).

In cases of fraud or undue influence, accounts long since settled will be re-opened from the commencement of the agency. Proof of one fraudulent overcharge has been held sufficient to entitle the principal to have the agent's accounts re-opened for a period of twenty years (*h*). So, where there were incorrect entries, and amounts unexplained and unaccounted for, in the accounts of a deceased agent of a company, who was also a large shareholder in the company, his accounts were re-opened after his death, for a period of twenty-five years (*i*).

*Statute of Limitations.*—By the Limitation Act, 1939 (*k*), s. 2 (2), an action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action. By section 19, no period of limitation prescribed by the Act applies to an action, by a beneficiary under a trust, in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy, or to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or received by him and converted to his use ; but, subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust (apart from any other limitation provided by the Act) may not be brought after six years from accrual of the right of action.

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(*u*) *Harry Parker, Ltd.* v. *Mason*, [1940] 2 K. B. 590, C. A. It matters not that the agent has falsely and fraudulently represented to the principal that the agent has the means of carrying out the illegal purpose (*ibid.*).
(*a*) *Padwick* v. *Stanley* (1852), 9 Hare 627.
(*b*) See note (*l*), above.
(*c*) *Mackenzie* v. *Johnston* (1819), 4 Madd. 373.
(*d*) See note (*n*), *ante*, p. 93.
(*e*) *Foley* v. *Hill* (1848), 2 H. L. Cas. 28 ; affirming 13 L. J. Ch. 182.
(*f*) *Fluker* v. *Taylor* (1855), 3 Drew. 183.
(*g*) *G. W. Ins. Co.* v. *Cunliffe* (1874), L. R. 9 Ch. 525 ; 43 L. J. Ch. 741.
(*h*) *Williamson* v. *Barbour* (1877), 9 Ch. D. 529 ; 50 L. J. Ch. 147.
(*i*) *Stainton* v. *Carron Co.* (1857), 27 L. J. Ch. 89 ; 24 Beav. 346.
(*k*) 2 & 3 Geo. 6, c. 21.

## Article 54

### DUTY TO ACCOUNT FOR ALL SECRET PROFITS

No agent is permitted to acquire any personal benefit in the course of, or by means of, his agency without the knowledge and consent of the principal (*l*).

Every agent must account to his principal for every benefit, and pay over to the principal every profit, acquired by him in the course of, or by means of, the agency without such knowledge and consent (*m*), even if, in acquiring the benefit or profit, he incurred a risk of loss (*n*), and the principal suffered no injury thereby (*o*).

Where a principal knows that his agent will receive remuneration from third persons in the course of the agency, and acquiesces in his so doing under a misapprehension as to the extent of the remuneration, such remuneration is not a benefit or profit acquired without the consent of the principal within the meaning of this Article, unless the agent misinformed or intentionally misled him as to the extent thereof, or, knowing that he laboured under such a misapprehension, neglected to correct it (*p*).

*Company directors.*—Neither directors nor officers of a company are permitted to retain any pecuniary benefits acquired in the conduct of the company's business, unless the particulars of such benefits are fully explained to, and are approved of by, the shareholders (*q*). This applies even though the directors act without fraud and in good faith (*r*). Nor does a clause in the articles of association providing that directors shall not be accountable to the company for any profits realised, by reason only of their holding that office or of the fiduciary relation thereby established, absolve directors who are also vendors to the company from liability to refund any profits in respect of the sale, of which they have not made a full and explicit disclosure (*s*).

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(*l*) *Parker* v. *McKenna* (1874), L. R. 10 Ch. 96 ; 44 L. J. Ch. 425 ; *Morison* v. *Thompson* (1874), L. R. 9 Q. B. 480 ; 43 L. J. Q. B. 215 ; *Imp. Mercantile Credit Co.* v. *Coleman* (1873), L. R. 6 H. L. 189 ; 42 L. J. Ch. 664 ; *Smith* v. *Lay* (1856), 3 Kay & J. 105 ; *Cohen* v. *Kushke* (1900), 83 L. T. 102. And see Illustrations.

(*m*) See previous page.

(*n*) *Williams* v. *Stevens* (1866), L. R. 1 P. C. 352 ; 36 L. J. P. C. 21 ; *Burrell* v. *Mossop* (1888), 4 T. L. R. 270, C. A.

(*o*) *Parker* v. *McKenna* (1874), L. R 10 Ch. 96 ; 44 L. J. Ch. 425 ; *Tarkwa Main Reef* v. *Merton* (1903), 19 T. L. R. 367.

(*p*) See also *Holden* v. *Webber* (1860), 29 Beav. 117.

(*q*) *General Exchange Bank* v. *Horner* (1869), L. R. 9 Eq. 480 ; *York, etc., Ry.* v. *Hudson* (1853), 22 L. J. Ch. 529 ; 16 Beav. 485 ; 96 R. R. 228 ; *Ex p. Hill* (1862), 32 L. J. Ch. 154 ; *Mann* v. *Edinburgh Tramways Co.* (1892), 9 T. L. R. 102, H. L. ; *Re Oxford Building Society* (1886), 35 Ch. D. 502 ; 56 L. J. Ch. 98 ; *Kaye* v. *Croydon Tramways Co.*, [1898] 1 Ch. 358 ; 67 L. J. Ch. 222, C. A. ; *Gluckstein* v. *Barnes*, [1900] A. C. 240 ; 69 L. J. Ch. 385, H. L. ; *Shaw* v. *Holland*, [1900] 2 Ch. 305 ; 69 L. J. Ch. 621, C. A. Comp. *Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65 ; 77 L. J. Ch. 94, C. A.

(*r*) *Regal (Hastings) Ltd.* v. *Gulliver*, [1942] 1 All E. R. 378.

(*s*) *Gluckstein* v. *Barnes*, [1900] A. C. 240 ; 69 L. J. Ch. 385, H. L. Comp. *Costa Rica Ry.* v. *Forwood*, [1901] 1 Ch. 746 ; 70 L. J. Ch. 385, C. A.

*Misapprehension as to extent of remuneration.*—It is usual for underwriters to allow insurance brokers, for punctual payment of premiums, ten per cent. cash discount, or twelve per cent. calculated on the yearly profits, in addition to the ordinary commission of five per cent. on each re-insurance. A company, having made no inquiry as to the remuneration paid by the underwriters, and not being aware of the twelve per cent. allowance, employed an insurance agent to negotiate its business. After the agent (who received no remuneration from the company) had been paid the usual allowance of twelve per cent. for more than eight years, the company discovered it and claimed to have it paid over to them as secret profit. It was held that they were not entitled to recover (*t*). This decision has been followed by the Court of Appeal in a later case, on the ground that every person who employs another as his agent with the knowledge that the agent receives remuneration from third persons, and who does not choose to inquire what the charges of the agent will be, must allow all the usual and customary charges of such an agent, and is not entitled to dispute them because he was not aware of the extent of the remuneration usually received by such agents (*u*).

In *Re Cape Breton Co.* (*a*), the Court of Appeal held that where an agent secretly sells to his principal goods which were the property of the agent before the commencement of the agency, and the principal declines to rescind the contract, or rescission has become impossible, the agent cannot, in the absence of misrepresentation (*b*), be called upon to account for the profit made by him upon the transaction, or for the difference between the contract price and the market value (*c*). This decision has been approved by the Judicial Committee of the Privy Council in *Burland* v. *Earle* (*d*), where a director, not purporting to act for the company, and in circumstances not making him a trustee for the company, purchased property, and subsequently sold it to the company at an enhanced price, without disclosing the profit, and it was held that, whether or not the company was entitled to rescind the transaction, it was not entitled to affirm it and claim the profit.

*Illustrations*

1. An agent purchases a debt due from his principal to a third person. He is only entitled to recover from his principal the amount he actually paid for the debt (*e*).

2. A barrister who was employed as a legal adviser and confidential agent, having acquired a knowledge of the extent of his client's property and

(*t*) *Great Western Insurance Co. of New York* v. *Cunliffe* (1874), L. R. 9 Ch. 525. See also *Norreys* v. *Hodgson* (1897), 13 T. L. R. 421, C. A. (agent to procure loan from insurance company, which required a policy on the life of the principal, held entitled to retain commission on the policy).

(*u*) *Baring* v. *Stanton* (1876), 3 Ch. D. 502, C. A. Comp. *Queen of Spain* v. *Parr* (1869), 39 L. J. Ch. 73 ; *Green* v. *Tughan* (1913), 30 T. L. R. 64.

(*a*) (1884), 26 Ch. D. 221 ; 29 Ch. D. 795, C. A. ; and see *Ladywell Mining Co.* v. *Brookes*, *Same* v. *Huggons* (1887), 35 Ch. D. 400 ; 56 L. J. Ch. 684, C. A. ; *Re Lady Forrest Gold Mine*, [1901] 1 Ch. 582 ; 70 L. J. Ch. 275.

(*b*) See *Hichens* v. *Congreve* (1831), 4 Sim. 420 ; *Re Leeds, etc., Theatre of Varieties*, [1902] 2 Ch. 809 ; 72 L. J. Ch. 1, C. A. ; Article 51, Illustration 1.

(*c*) On appeal to the House of Lords, *sub nomine Cavendish Bentinck* v. *Fenn* (1887), 12 App. Cas. 652, the decision was affirmed on other grounds.

(*d*) [1902] A. C. 83 ; 71 L. J. P. C. 1. Cp. *Cook* v. *Deeks*, [1916] 1 A. C. 554 ; 85 L. J. P. C. 161, P. C.

(*e*) *Reed* v. *Norris* (1837), 3 My. & C. 361, 374 ; 6 L. J. Ch. 197.

liabilities, purchased certain charges on the client's estates for less than their nominal value, after he had ceased to act for the client. Held, that he was only entitled to recover from the client the amount actually paid for the charges, with interest, he having purchased them without the consent of the client (*f*). The employment of a person in such a capacity disables him from purchasing any such charges, or otherwise obtaining a personal benefit in the course of his employment, except with the principal's permission, and the disability continues for so long after the fiduciary relation has ceased as the reasons on which it is founded continue to operate (*f*)

3. A consigned a ship to B for sale at a minimum price. B, with A's consent, employed C to sell the ship. C, being unable to find a purchaser, bought the ship himself at the minimum price without the consent of A, and subsequently resold her at a large profit. Held, that C must account to A for the profit (*g*). So, where a sub-agent, employed to procure an advance, received a secret commission from the persons making the advance, it was held that he was accountable for such commission to the principal (*h*). A broker who is instructed to buy shares at a certain price must account for the profit if he obtain the shares at less than that price (*i*). Where an agent makes a secret profit in the course of his employment, and there are no accounts remaining to be taken between him and his principal, he is bound to pay over such profit as money had and received to the use of the principal (*k*).

4. A partner, in negotiating the transfer of a lease on behalf of the firm, stipulated for a personal benefit. Held, that he must account to the firm for the value of the benefit received (*l*).

5. The trustee of a will, who was a stockbroker's clerk, instructed the firm by which he was employed to value securities of the estate and, according to a previous agreement with the firm, received part of the firm's remuneration as his commission. Held, he must account to the estate for the amount so received (*m*).

6. A, having bought certain shares at £2 each, and knowing that B desired to purchase some, represented to B that he could obtain them at £3 or less, and asked B to authorise him to buy at £3. B gave him the authority. A then transferred his own shares to B at £3 each, representing that C was the vendor. Held, that A must account to B for the profit of £1 per share (*n*).

7. A requested B to provide an outfit for A's son. B did so, and obtained certain discounts, but charged A the full prices. The discounts were disallowed, although B did not charge any commission as an agent (*o*).

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(*f*) *Carter* v. *Palmer* (1841), 8 Cl. & F. 657 ; 54 R. R. 145, H. L. ; *Hobday* v. *Peters* (1860), 29 L. J. Ch. 780 ; 28 Beav. 349. And see *Patten* v. *Hamilton*, [1911] 1 Ir. R. 46, C. A.

(*g*) *De Bussche* v. *Alt* (1877), 8 Ch. D. 286 ; 47 L. J. Ch. 381, C. A. And see *Barker* v. *Harrison* (1846), 2 Coll. 546.

(*h*) *Powell* v. *Jones*, [1905] 1 K. B. 11 ; 74 L. J. K. B. 115, C. A.

(*i*) *Thompson* v. *Meade* (1891), 7 T. L. R. 698. Comp. *Platt* v. *Rowe* (1909), 26 T. L. R. 49 (agreement with principal that agent should take the profit as remuneration).

(*k*) *Morison* v. *Thompson* (1874), L. R. 9 Q. B. 480 ; 43 L. J. Q. B. 215.

(*l*) *Fawcett* v. *Whitehouse* (1829), 4 L. J. (o.s.) Ch. 64 ; 1 Russ. & M. 132 ; 32 R. R. 163. See also *Featherstonhaugh* v. *Fenwick* (1811), 17 Ves. 298 ; 11 R. R. 78.

(*m*) *Williams* v. *Barton*, [1927] 2 Ch. 9 ; 96 L. J. Ch. 355.

(*n*) *Kimber* v. *Barber* (1872), L. R. 8 Ch. 56.

(*o*) *Turnbull* v. *Garden* (1869), 20 L. T. 318. See also *Hippisley* v. *Knee*, [1905] 1 K. B. 1 ; 74 L. J. K. B. 68.

8. A shipmaster, being authorised to employ his vessel to the best advantage, and being unable to procure remunerative freight, loaded her with a cargo of his own. Held, that he must account to the owners for the profit made for the sale of the cargo, and not merely for reasonable freight (*p*).

9. The managing owner of a ship, being a provision merchant, furnishes supplies for the ship. He is only entitled to charge cost prices, unless the other part-owners, with full knowledge of the circumstances, consent to pay profit prices (*q*).

10. Commission agents, who are also merchants, are employed to ship and sell goods abroad. They do so, and purchase other goods with the proceeds. They are not bound to account for the profit on the sale of the goods bought with the proceeds, because such profit is not made in the course or by means of the agency. They are only bound to account for the proceeds of the goods sold on the principal's behalf (*r*).

11. A, a stockbroker, buys shares upon B's instructions. B fails to carry out the contract, so that A is justified in selling the shares against him. A has a fair price fixed by a jobber, and sells, and on his own account repurchases the shares at that price. If, by reason of the sale and repurchase being effected in one transaction, A was enabled to buy the shares at a lower price than he could have bought them at in the market in the ordinary way, he must account to B for the difference (*s*).

12. A solicitor, who was retained by A to act for him in negotiations for the purchase of a patent, had previously received a commission note from the owner of the patent agreeing to pay him commission in the event of a purchaser being found. A purchased the patent, and the solicitor, with A's knowledge, received the commission from the seller. Held, that he was not accountable to A for the commission, having made full disclosure (*t*).

*Directors and Officers of Companies* (*u*)

13. The directors of a company, on the transfer of the business to another company, receive from the transferees, without the knowledge of the transferors, a large sum by way of compensation. They must pay over such sum to the first-mentioned company (*a*).

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(*p*) *Shallcross* v. *Oldham* (1862), 2 Johns. & H. 609.

(*q*) *Ritchie* v. *Couper* (1860), 28 Beav. 344 ; cf. *Sherrard* v. *Barron*, [1923] 1 Ir. R. 21, C. A. (Ir.). See also *Williamson* v. *Hine*, [1891] 1 Ch. 390 ; 60 L. J. Ch. 123.

(*r*) *Kirkham* v. *Peel* (1881), 43 L. T. 171 ; 44 L. T. 195, C. A.

(*s*) *Erskine* v. *Sachs*, [1901] 2 K. B. 504 ; 70 L. J. K. B. 978, C. A.

(*t*) *Re Haslam*, [1902] 1 Ch. 765 ; 71 L. J. Ch. 734, C. A.

(*u*) Promoters of a company are not allowed to make secret profits in their dealings with the company. See *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218 ; 48 L. J. Ch. 73, H. L. ; *Bagnall* v. *Carlton* (1877), 6 Ch. D. 371 ; 47 L. J. Ch. 30, C. A. ; *Lydney Iron Ore Co.* v. *Bird* (1886), 33 Ch. D. 85 ; 55 L. J. Ch. 875, C. A. ; *Emma Silver Mining Co.* v. *Lewis* (1879), 4 C. P. D. 396 ; 48 L. J. C. P. 257 ; *Same* v. *Grant* (1877), 11 Ch. D. 918 ; *Whaley Bridge Calico Co.* v. *Green* (1879), 5 Q. B. D. 109 ; 49 L. J. Q. B. 326 ; *Hichens* v. *Congreve* (1831), 4 Sim. 420 ; *Re Sale Hotel, etc., ex p. Hesketh* (1898), 78 L. T. 368, C. A. ; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392, C. A. ; *Re Lady Forrest Gold Mine*, [1901] 1 Ch. 582 ; 70 L. J. Ch. 275 ; *Re Leeds, etc., Theatre of Varieties*, [1902] 2 Ch. 809 ; 72 L. J. Ch. 1, C. A. ; *Omnium Electric Palaces* v. *Baines*, [1914] 1 Ch. 332 ; 83 L. J. Ch. 372, C. A. ; *Jubilee Cotton Mills* v. *Lewis*, [1924] A. C. 958 ; 93 L. J. Ch. 414, H. L.

(*a*) *Gaskell* v. *Chambers* (1858), 28 L. J. Ch. 385 ; 26 Beav. 360.

14. A director of a company, established for acquiring and working ships, with the consent of his co-directors, but without the knowledge of the shareholders, undertook the office of ship's husband. Held, that he must refund to the company, with interest, all moneys received by him for commission and brokerage as ship's husband (*b*). So, a solicitor, who is a director, is not permitted to receive any remuneration for his services, professional or otherwise, unless such remuneration is sanctioned by resolution of the shareholders (*c*).

15. A agreed to become a director of a company on condition that the promoters indemnified him in respect of the amount paid for qualification shares. A afterwards resigned, and the promoters, in pursuance of the agreement, purchased the shares (which had become valueless) from him at the original price. Held, that A must account to the company for the value of the indemnity constituted by his secret agreement with the promoters —*i.e.*, for the original price of the shares (*d*). So, where the first five directors of a company, being bound each to hold twenty qualification shares, accepted that number from the promoter with the knowledge and approval of each other, it was held that they were jointly and severally liable to pay to the liquidator of the company the original value of such shares (*e*).

## DUTIES OF PARTICULAR CLASSES OF AGENTS

### 1. Factors

It is the duty of a factor—

(1) to give his principal the free and unbiased use of his judgment and discretion (*f*) ;
(2) to act in person, unless authorised to delegate his authority (*g*) ;
(3) to keep and render just and true accounts (*f*) ;
(4) to keep the property of the principal separate from his own and from that of other persons (*f*) ;
(5) to keep each sale distinct and separate from other transactions (*h*) ;
(6) to account for goods sold, pay over the proceeds, and deliver unsold goods to the principal, on demand (*i*) ;
(7) to keep goods intrusted to him for sale with as much care as would be taken by a prudent man in respect of his own goods (*k*), and not to barter (*l*), or pledge them (*m*) unless expressly authorised to do so ;
(8) to insure goods consigned to him, if instructed to do so, or if he has been in the habit of doing so (*n*) ;

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(*b*) *Benson* v. *Heathorn* (1842), 1 Y. & Coll. C. C. 326.
(*c*) *North Eastern Ry.* v. *Jackson* (1870), 19 W. R. 198.
(*d*) *Re North Australian Territory Co., Archer's Case*, [1892] 1 Ch. 322, C. A.
(*e*) *Re Carriage Supply Association* (1884), 27 Ch. D. 322 ; 53 L. J. Ch. 1154.
(*f*) *Clarke* v. *Tipping* (1846), 9 Beav. 284 ; *Gray* v. *Haig* (1854), 20 Beav. 219 ; 109 R. R. 396.
(*g*) *Cockran* v. *Irlam* (1813), 2 M. & S. 301. And see Article 41.
(*h*) *Guerreiro* v. *Peile* (1820), 2 B. & A. 616.
(*i*) *Topham* v. *Braddick* (1809), 1 Taunt. 572.
(*k*) *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 918.
(*l*) *Guerreiro* v. *Peile* (1820), 3 B. & A. 616.
(*m*) *Martini* v. *Coles* (1813), 1 M. & S. 140 ; *Gill* v. *Kymer* (1821), 5 Moo. 503 ; *Fielding* v. *Kymer* (1821), 2 B. & B. 639.
(*n*) *Smith* v. *Lascelles* (1788), 2 T. R. 187.

(9) not to purchase the principal's goods for himself, without full and fair disclosure (*o*).

## 2. Brokers

It is the duty of a broker—

(1) to contract in the name of his principal, subject to any special instructions or usage to the contrary (*p*) ;

(2) to execute contracts in such a way as to be legally binding on both parties (*q*), and so as to give each party a right to sue thereon (*r*) ;

(3) to inform his principal of the terms of any contract made on his behalf (*s*) ;

(4) to comply with statutory provisions, in entering into contracts, notwithstanding a custom amongst brokers to disregard such provisions (*t*) ;

(5) to make a careful estimate of the value of goods which he is instructed to sell, so that he may not sell for less than their value (*u*) ;

(6) to exercise his skill and fairly communicate his opinion to his principal (*x*) ;

(7) not to deliver goods sold by him, except in accordance with the terms of sale (*y*) ;

(8) not to sell his own property to his principal, nor buy the principal's property himself, without full and fair disclosure (*a*).

It is not part of his duty, in the absence of a special contract or custom, to examine goods bought by him, for the purpose of ascertaining whether they are of the quality bought (*b*). A broker who merely issues a bill of lading acts on behalf of the owner and not the shipper, he is not therefore liable for breach of any contractual relationship if a bill is negligently issued. Nor is the broker under any duty to the public not to issue a bill containing a negligent misstatement, and since a bill negligently issued is a nullity, he is not liable for breach of warranty of authority (*c*).

## 3. Shipmasters (*d*)

It is the duty of a shipmaster to give the whole of his time to the service of his principal, and therefore not to trade on his own account (*e*), nor give

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(*o*) *Clarke* v. *Tipping* (1846), 9 Beav. 284.

(*p*) *Baring* v. *Corrie* (1818), 2 B. & A. 137. See Article 40, Illustration 8.

(*q*) *Grant* v. *Fletcher* (1826), 5 B. & C. 436.

(*r*) Article 40, Illustrations 9 and 10.

(*s*) *Johnson* v. *Kearley*, [1908] 2 K. B. 514 ; 77 L. J. K. B. 904, C. A. And see Article 71, Illustration 12.

(*t*) *E.g.*, The Banking Companies (Shares) Act, 1867 (" Leeman's Act ") (30 & 31 Vict. c. 29) ; *Neilson* v. *James* (1882), 9 Q. B. D. 546 ; 51 L. J. Q. B. 369, C. A.

(*u*) *Solomon* v. *Barker* (1862), 2 F. & F. 726.

(*x*) *Ex p. Dyster* (1816), 2 Rose 349.

(*y*) *Boorman* v. *Brown* (1842), 11 C. & F. 1.

(*a*) *Wilson* v. *Short* (1847), 6 Hare 366 ; *Tetley* v. *Shand* (1872), 25 L. T. 658 ; *Rothschild* v. *Brookman* (1831), 2 Dow. & Cl. 188, H. L. ; *Ex p. Huth, re Pemberton* (1840), Mont. & Ch. 667. See, however, Article 70, Illustration 13.

(*b*) *Zwilchenbart* v. *Alexander* (1860), 1 B. & S. 234 ; 30 L. J. Q. B. 254, Ex. Ch.

(*c*) *Heskell* v. *Continental Express Ltd.*, [1950] 1 All E. R. 1033.

(*d*) For the authority of shipmasters as agents of necessity, see pp. 65-68, ***ante***.

(*e*) *Gardner* v. *M'Cutcheon* (1842), 4 Beav. 534.

any portion of his personal services to another (*f*). A custom for shipmasters to trade on their own account is, apparently, unlawful (*e*).

## 4. Auctioneers

It is the duty of an auctioneer—

(1) to act in person (*g*) ;

(2) to sell for ready money only, in the absence of instructions to the contrary (*h*) ;

(3) to disclose his principal (*i*) ;

(4) to use due diligence in requiring that the deposit be duly paid (*k*), and if it be paid to him, to hold it as stakeholder until the completion of the transaction (*l*) ;

(5) to sell to a third person (*m*) ;

(6) to accept the highest *bona fide* bid, where he sells without reserve, notwithstanding express instructions from his principal to the contrary (*n*) ;

(7) to account for the proceeds of goods sold, to the person from whom he received them (*o*) ;

(8) not to deliver goods sold until paid for, nor allow any deduction from the price, unless authorised to do so by the principal (*p*) ;

(9) if appointed to conduct a sale by the Court, to pay into Court, or to the solicitors of the vendors for payment into Court, any money received by him (*q*).

## 5. Solicitors

It is the duty of a solicitor—

(1) to obey the express instructions of his client, notwithstanding counsel's advice to the contrary (*r*) ;

(2) to give his clients the benefit of his personal superintendence and judgment (*s*) ;

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(*f*) *Thompson* v. *Havelock* (1808), 1 Camp. 527.

(*g*) *Coles* v. *Trecothick* (1804), 9 Ves. 234. Every person who acts as an auctioneer must take out a licence under the Auctioneers Act, 1845 (8 & 9 Vict. c. 15), s. 4.

(*h*) *Ferrers* v. *Robbins* (1835), 2 C. M. & R. 152 ; *Sykes* v. *Giles* (1839), 5 M. & W. 645 ; 9 L. J. Ex. 106.

(*i*) *Franklyn* v. *Lamond* (1847), 16 L. J. C. P. 221 ; 4 C. B. 637.

(*k*) *Hibbert* v. *Bayley* (1860), 2 F. & F. 48 ; *Andrade* v. *Sotheby* (1931), 47 T. L. R. 244.

(*l*) *Gray* v. *Gutteridge* (1827), 3 C. & P. 40 ; *Yates* v. *Farebrother* (1819), 4 Madd. 239 ; *Burrough* v. *Skinner* (1770), 5 Burr. 2639.

(*m*) *Oliver* v. *Court* (1820), Dan. 301.

(*n*) *Warlow* v. *Harrison* (1858), 29 L. J. Q. B. 14 ; 1 El. & El. 295, 309 ; 117 R. R. 219, Ex. Ch. ; *Bexwell* v. *Christie* (1776), Cowp. 395.

(*o*) *Crosskey* v. *Mills* (1834), 1 C. M. & R. 298 ; *Crowther* v. *Elgood* (1887), 34 Ch. D. 691 ; 56 L. J. Ch. 416, C. A. ; *Parsons* v. *Dewsbury* (1887), 3 T. L. R. 354, C. A.

(*p*) *Brown* v. *Staton* (1816), 2 Chit. 353.

(*q*) *Biggs* v. *Bree* (1882), 51 L. J. Ch. 64, 263, C. A. ; *Brown* v. *Farebrother* (1888), 58 L. J. Ch. 3.

(*r*) *Fray* v. *Voules* (1859), 1 El. & El. 839 ; 28 L. J. Q. B. 232 ; 117 R. R. 483 ; *Butler* v. *Knight* (1867), L. R. 2 Ex. 109 ; 36 L. J. Ex. 66.

(*s*) *Hopkinson* v. *Smith* (1822), 1 Bing. 13 ; but see *Myers* v. *Rothfield* (1938), 54 T. L. R. 1045, C. A. As to the position of a solicitor acting for a client who is insured under a policy which gives control of proceedings to the insurance company : see *Re Crocker*, [1936] Ch. 696 ; 105 L. J. Ch. 276 ; *Groom* v. *Crocker*, [1939] 1 K. B. 194 ; 108 L. J. K. B. 296, C. A.

(3) to know and observe the rules of practice and procedure in the Courts (*t*) ;

(4) to keep a record of his transactions with his clients (*u*) ;

(5) to check useless litigation (*x*), and before instituting proceedings, especially on behalf of a wife against her husband, carefully to ascertain the facts of the case and consider whether there is a reasonable prospect of success (*y*) ;

(6) to communicate to his client any offers of compromise made to him in the course of conducting a suit (*z*) ;

(7) to keep secret all confidential communications made to him, and all information and knowledge of his client's affairs acquired by him, in the course of his employment as solicitor (*a*) ;

(8) not to act for the opponent of his client, or of a former client, in any case in which his knowledge of the affairs of such client or former client will give him an undue advantage (*b*). An injunction will be granted to restrain a solicitor from communicating to the opponent of a former client confidential communications made to him, or documents or facts coming to his knowledge, as the solicitor of the former client (*b*) ; and when there is a chance of his using any such communications or knowledge to the detriment of the former client, from acting as solicitor for the opponent (*b*). In the application of this principle it is quite immaterial whether the solicitor was discharged by his former client, or ceased to act for him voluntarily (*b*) ;

(9) to continue, until its termination, the conduct of any cause undertaken by him, unless there is good reason to abandon it (*e.g.*, the failure of the client, after reasonable notice, to supply him with funds for out-of-pocket expenses), and when there is such good reason, to give his client reasonable notice of his intention to abandon the cause (*c*) ;

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(*t*) *Godefroy* v. *Dalton* (1830), 6 Bing. 460. When instructed to make a claim against a public authority he must bear in mind the provisions of the Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 21 : *Fletcher* v. *Jubb*, [1920] 1 K. B. 275, C. A.

(*u*) *Ex p. Swinbanks, re Shanks* (1879), 11 Ch. D. 525 ; 48 L. J. Bkcy. 120, C. A.

(*x*) *Ottley* v. *Gilby* (1845), 14 L. J. Ch. 177 ; 8 Beav. 602 ; *Re Clarke* (1851), 21 L. J. Ch. 20 ; 1 De G. M. & G. 43.

(*y*) *Re Hooper, Baylis* v. *Watkins* (1864), 33 L. J. Ch. 300 ; *Walker* v. *Walker* (1897), 76 L. T. 234 ; *Beer* v. *Beer* (1906), 22 T. L. R. 367. See also *Abrahams* v. *Buckley*, [1924] 1 K. B. 903 ; 93 L. J. K. B. 603.

(*z*) *Sill* v. *Thomas* (1839), 8 C. & P. 762.

(*a*) *Davies* v. *Clough* (1836), 6 L. J. Ch. 113 ; 8 Sim. 262 ; *Biggs* v. *Head* (1837), Sau. & Sc. 335 ; *Taylor* v. *Blacklow* (1836), 3 Scott 614.

(*b*) *Lewis* v. *Smith* (1848), 1 Mac. & G. 417 ; *Hutchins* v. *Hutchins* (1825), 1 Hog. 315 ; *Davies* v. *Clough, supra ; Cholmondeley* v. *Clinton* (1815), 19 Ves. 261 ; *Biggs* v. *Head* (1837), Sau. & Sc. 335, and cases reported in notes thereto. Comp. *Johnson* v. *Marriott* (1833), 2 C. & M. 183 ; *Grissell* v. *Petro* (1832), 9 Bing. 1 ; *Parratt* v. *Parratt* (1848), 2 De G. & Sm. 258 ; *Hutchinson* v. *Newark* (1850), 3 De G. & Sm. 727 ; *Robinson* v. *Mullett* (1817), 4 Price 353 ; *Rakusen* v. *Ellis*, [1912] 1 Ch. 831 ; 81 L. J. Ch. 409, C. A., overruling *Little* v. *Kingswood Collieries Co.* (1882), 20 Ch. D. 733 ; 51 L. J. Ch. 498.

(*c*) *Nicholls* v. *Wilson* (1843), 12 L. J. Ex. 266 ; 11 M. & W. 106 ; *Harris* v. *Osbourn* (1834), 3 L. J. Ex. 182 ; 2 C. & M. 629 ; *Whitehead* v. *Lord* (1852), 7 Ex. 691 ; 21 L. J. Ex. 239 ; *Van Sandau* v. *Browne* (1832), 2 L. J. C. P. 34 ; 9 Bing. 402 ; *Hoby*

(10) not to bargain for nor accept any gift or reward from his client during the continuance of his employment, beyond the amount of his proper professional remuneration (*d*) ;

(11) not to employ counsel, nor incur other unusual expenses, when the fees or expenses are not taxable as between party and party, without explaining to the client that such fees or expenses are not recoverable from the other side even in the event of success (*e*) ;

(12) if he prepare a deed in which he takes a personal interest, to insert all the usual clauses and explain fully to the client the effect of the deed (*f*) ;

(13) if he contract with a client, to explain fully the transaction and make a full disclosure of everything known to him respecting the subject-matter (*g*) ;

(14) if he receive the deposit at a sale by auction, to pay it over to his client on demand, and not retain it as a stakeholder (*h*), unless the conditions of sale provide that he shall so retain it ;

(15) if he act as the independent adviser of a person about to make a gift to, or voluntary settlement upon, a person occupying a fiduciary position towards his client, to satisfy himself that his client understands and desires to carry out the transaction, and that the gift or settlement is one which it is right and proper, in all the circumstances, for him to make ; and if he be not so satisfied, to advise his client accordingly, and to refuse to act further in the transaction in the event of the client insisting, contrary to such advice, upon carrying it out (*i*). In such a case, the solicitor ought not to act for the donee as well as the donor (*i*).

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v. *Built* (1832), 1 L. J. K. B. 121 : 3 B. & Ad. 350 ; *Wadsworth* v. *Marshall* (1832), 2 C. & J. 665 ; 37 R. R. 810 ; *Underwood* v. *Lewis*, [1894] 2 Q. B. 306 ; 64 L. J. Q. B. 60, C. A. Article 68, Illustration 3.

(*d*) *O'Brien* v. *Lewis* (1863), 32 L. J. Ch. 569. See Article 51, Illustration 14.

(*e*) *Foy* v. *Cooper* (1842), 2 Q. B. 937 ; *Re Broad* (1885), 15 Q. B. D. 420 ; 54 L. J. Q. B. 573, C. A.

(*f*) *Cockburn* v. *Edwards* (1881) 18 Ch. D. 449 ; 51 L. J. Ch. 46, C. A. ; *Willis* v. *Barron*, [1902] A. C. 171 ; 71 L. J. Ch. 609, H. L. This principle applies also to counsel : *Segrave* v. *Kirwan* (1828), Beat. 157.

(*g*) *Pisani* v. *Gibralter* (1874), L. R. 5 P. C. 516, P. C. ; *Savery* v. *King* (1856), 5 H. L. Cas. 627 ; 25 L. J. Ch. 482 ; 101 R. R. 299 ; *Ward* v. *Sharp* (1883), 53 L. J. Ch. 313 ; *Luddy* v. *Peard* (1886), 33 Ch. D. 500 ; 55 L. J. Ch. 884 ; *Prees* v. *Coke* (1871), L. R. 6 Ch. 645. And see Article 51, Illustrations 9, 10, 12 and 13.

(*h*) *Edgell* v. *Day* (1865), L. R. 1 C. P. 80 ; 35 L. J. C. P. 7.

(*i*) *Powell* v. *Powell*, [1900] 1 Ch. 243 ; 69 L. J. Ch. 164 ; *Wright* v. *Carter*, [1903] 1 Ch. 27 ; 72 L. J. Ch. 138, C. A. And see *Willis* v. *Barron*, [1902] A. C. 171 ; 71 L. J. Ch. 609, H. L.

# CHAPTER VI

## LIABILITIES OF AGENTS TO THEIR PRINCIPALS

### Article 55

IN RESPECT OF CONTRACTS ENTERED INTO ON BEHALF OF THE PRINCIPAL

EXCEPT in the case of insurance brokers, who are, by usage, personally liable to the underwriters for premiums payable under policies effected by them (*a*), no agent incurs any personal liability to his principal in respect of any contract entered into by him on the principal's behalf, and in pursuance of his authority, unless he was acting under a *del credere* commission (*b*), or acted as agent for both parties, and so contracted a personal liability (*c*). The liability of an agent who contracts under a *del credere* commission is confined to answering for the failure of the other contracting party, owing to insolvency or the like, to pay any ascertained sums which may become due from that party as debts (*d*).

*Illustration*

A stockbroker sells shares to a jobber on the Stock Exchange, and does not disclose the name of the buyer in the contract note sent to the principal. The buyer fails. There is no rule or custom by which the broker in such a case is personally liable to the principal for the price of the shares or for the due performance of the contract, and the broker incurs no such liability (*e*).

### Article 56

LIABILITY ON BILLS OF EXCHANGE SIGNED WITHOUT QUALIFICATION

Where an agent, in the course of the agency, signs a bill of exchange in his own name, without qualification, as drawer or indorser, and the principal becomes the holder of the bill, the question whether the agent is personally liable to the principal on the bill depends upon what was the real intention of the parties. If the agent intended to bind himself, or if, by signing without qualification,

(*a*) *Baker* v. *Langhorn* (1816), 6 Taunt. 519 ; *Lee* v. *Bullen* (1858), 27 L. J. Q. B. 161 ; 8 El. & Bl. 692, n.

(*b*) *Varden* v. *Parker* (1799), 2 Esp. 710 ; *Alson* v. *Sylvester* (1823), 1 C. & P. 107 ; *Risbourg* v. *Bruckner* (1858), 3 C. B. (N.S.) 812 ; 27 L. J. C. P. 90. See Illustration.

(*c*) Article 116, Illustration 10.

(*d*) *Churchill* v. *Goddard*, [1937] 1 K. B. 92 ; *Gabriel* v. *Churchill*, [1914] 3 K. G. 1272 ; 84 L. J. K. B. 733, C. A. ; *Hornby* v. *Lacy* (1817), 6 M. & S. 166 ; *Morris* v. *Cleasby* (1816), 4 M. & S. 566.

(*e*) *Gill* v. *Shepherd* (1902), 8 Com. Cas. 48.

he led the principal to believe that such was his intention, and to act in a way in which he would not have acted but for such belief, the agent is liable to the principal on the bill. Otherwise, he is not so liable (*f*).

Thus, where a broker, who had no authority to draw bills on behalf of the principal, was employed to sell goods, and sold them for a bill at a given date, and drew on the purchaser for the amount, he was held liable to the principal on the bill, on the ground that his signature, as drawer, might have misled the principal and prevented him from making inquiries as to the solvency of the purchaser (*f*). So, where an agent who is instructed to purchase foreign bills for his principal, indorses such bills, intending to guarantee them, or indorses and sends his own bills in execution of the order, he is liable to the principal on the indorsement (*f*). But, where it is not intended that the agent shall be bound, the mere fact that he signs a bill without qualification does not render him liable to the principal, but only to third persons who become holders thereof in due course (*f*).

## Article 57

### LIABILITY FOR NEGLIGENCE AND OTHER BREACHES OF DUTY

Except in the case of counsel, who are under no liability to their clients for negligence or other breaches of duty in the course of their employment as such (*g*), every agent is liable to make good any legal damage suffered by his principal in consequence of the agent's negligence or other breach of duty in the course of the agency (*h*).

Provided that—

(a) where an agent is clearly authorised to do any particular act, or to effect any particular transaction, he is not liable to the principal for any loss or injury suffered in consequence of the imprudent or improper nature of that act or transaction (*i*) ;

(b) where an agent strictly follows the instructions of the principal (*k*), or, in the absence of express instructions, acts in accordance with usage and in the ordinary course

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(*f*) *Castrique* v. *Buttigieg* (1855), 10 Moo. P. C. C. 94, P. C. ; *Goupy* v. *Harden* (1816), 2 Marsh. 454 ; *Le Feuvre* v. *Lloyd* (1814), 1 Marsh. 318 ; *Kidson* v. *Dilworth* (1818), 5 Price 564.

(*g*) *Fell* v. *Brown* (1791), 1 Peake 131 ; *Mulligan* v. *M'Donagh* (1860), 2 L. T. 136.

(*h*) See Illustrations and Article 142, Illustration 2. The Statute of Limitations runs in favour of the agent from the time of the act or omission constituting the breach of duty : *Wood* v. *Jones* (1889), 61 L. T. 551 ; *Bean* v. *Wade* (1885), 2 T. L. R. 157, C. A. ; *Smith* v. *Fox* (1848), 6 Hare 386 ; *Howell* v. *Young* (1826), 5 B. & C. 259 ; *Short* v. *M'Carthy* (1820), 3 B. & A. 626. For a case in which bailees converted goods and then fraudulently concealed the cause of action, see *Beaman* v. *A. R. T. S.*, [1949] 1 K. B. 550.

(*i*) Illustration 15.

(*k*) *Pariente* v. *Lubbock* (1855), 8 De G. M. & G. 5 ; *Warwicke* v. *Noakes* (1790), 1 Peake 98.

of business (*l*), or upon the best advice he can obtain under the circumstances (*m*), or uses his best judgment in a matter of discretion (*n*), he is not liable to the principal for loss or injury resulting therefrom.

In this Article, negligence means the neglect or omission by an agent to exercise such a degree of skill, care and diligence as it is his duty in the circumstances to exercise (*o*).

*Directors*

The following general principles as to the liability of directors for negligence have been laid down (*p*) : (1) " A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience (*q*), that is to say, he is not liable for mere errors of judgment. (2) A director is not bound to give continuous attention to the affairs of his company (*p*). (3) In respect of all duties that, having regard to the exigencies of business and the articles of association may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly " (*r*). Romer, J., preferred to define the principles in terms of the extent of a director's duty rather than to use the term " gross negligence " (*s*).

*Gratuitous Agents*

A gratuitous agent is said to be liable for " gross negligence " (*t*) if he fail to exercise such skill as he actually possesses, or has held himself out to possess, or such skill as may reasonably be implied from his profession or employment (*u*) or to exercise such care and diligence as he is in the habit of exercising in regard to his own affairs (*x*) ; he is not liable for mere want of skill (*a*).

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(*l*) *Russell* v. *Hankey* (1794), 6 T. R. 12 ; *Lambert* v. *Heath* (1846), 15 M. & W. 486 ; *Moore* v. *Mourgue* (1776), Cowp. 479 ; *Nitrate Producers' S. S. Co.* v. *Wills* (1905), 21 T. L. R. 699, H. L. Illustrations 8, 9 and 13.

(*m*) *Miles* v. *Bernard* (1795), 2 Peake 61.

(*n*) *Comber* v. *Anderson* (1808), 1 Camp. 523 ; *Cullerne* v. *L. & S. Building Society* (1890), 25 Q. B. D. 485 ; 59 L. J. Q. B. 525, C. A. ; *Chown* v. *Parrott* (1863), 14 C. B. (N.S.) 74 ; 32 L. J. C. P. 197 ; *Re Cobridge S. S. Co. and Bucknall S. S. Lines* (1910), 15 Com. Cas. 138, C. A.

(*o*) See Article 46 and Illustrations thereto. See also Illustrations 9, 13 and 16.

(*p*) *Re The City Equitable Fire Insurance Co.*, [1925] Ch. 407 at p. 427 ; 94 L. J. Ch. 445.

(*q*) *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate*, [1899] 2 Ch. 392 ; 68 L. J. Ch. 699, C. A.

(*r*) *Dovey* v. *Corey*, [1901] A. C. 477 ; 70 L. J. Ch. 753, H. L. ; *Préfontaine* v. *Grenier*, [1907] A. C. 101 ; 76 L. J. P. C. 4, P. C. ; *Lucas* v. *Fitzgerald* (1903), 20 T. L. R. 16.

(*s*) [1925] Ch. 427.

(*t*) *Ellsee* v. *Gatward* (1793), 5 T. R. 143 ; *Wilkinson* v. *Coverdale* (1793), 1 Esp. 75 ; 53 R. R. 256 ; *Beauchamp* v. *Powley* (1831), 1 M. & Rob. 38 ; *Doorman* v. *Jenkins* (1834), 4 L. J. K. B. 29 ; 2 A. & E. 256.

(*u*) *Shiells* v. *Blackburne* (1789), 1 H. Bl. 159.

(*x*) *Wilson* v. *Brett* (1843), 11 M. & W. 113 ; 12 L. J. Ex. 264 ; 63 R. R. 528 ; *Dartnall* v. *Howard* (1825), 4 B. & C. 345 ; *Whitehead* v. *Greetham* (1825), 2 Bing. 464, Ex. Ch. ; *Donaldson* v. *Haldane* (1840), 7 C. & F. 762, H. L.

(*a*) *Moffatt* v. *Bateman* (1869), L. R. 3 P. C. 115, P. C.

*Liability of Solicitors for Negligence and Other Breaches of Duty*

Arising out of the contract, and only out of the contract (*b*), with his client, a solicitor is under a duty to exercise the degree of care, skill and knowledge of the reasonably competent and diligent solicitor. He is only liable if he is guilty of some misconduct or fraudulent proceeding or of some " gross negligence " or " gross ignorance " (*c*). Where, however, there is any evidence at all of negligence, the question whether there has been gross negligence or not ought to be submitted to the jury (*d*). A lessee consulted a solicitor in reference to the building of a certain wall, to the erection of which the lessor objected. The lease was shown to the solicitor, who, without making any inquiry as to whether there was any obstacle other than such as might be ascertained from the lease, advised that the lessee might build the wall, there being, in fact, a restrictive covenant in favour of the original vendors. Held, that there was no evidence of negligence (*e*). So, a solicitor is not liable merely because he has made a mistake ; or has given his client erroneous or bad advice (*f*); or has misinterpreted a rule of Court, the meaning of which is obscure (*g*). Nor is he liable for an error of judgment upon a point of new occurrence, or of nice or doubtful construction, or in respect of a matter such as is usually intrusted to counsel (*h*). But he is liable for the consequences of his ignorance or non-observance of the rules of practice ; for want of reasonable care in the preparation of a cause for trial, or for neglecting to attend at the trial with his witnesses ; or for the mismanagement of so much of the cause as is usually intrusted to him (*h*). Thus, where a solicitor was employed to take proceedings against certain apprentices for misconduct, and proceeded on the section of the statute relating to servants, he was held liable for the damages and costs incurred by reason of the error (*i*). So, where a solicitor allowed a case to be called on without ascertaining whether a material witness, whom his client had promised to bring, was in Court, it was held that there was sufficient evidence of want of reasonable care to go to the jury (*k*). Where a solicitor allowed judgment to go against his client by default, it was held that the solicitor must show that there was no defence, in order to rebut the inference of negligence, and that it was not necessary for the client to prove that he had a good defence (*l*). Solicitors have been held liable in actions for negligence for lending money on insufficient security (*m*) ; for omitting to give due notice

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(*b*) *Lake* v. *Bushby*, [1949] 2 All E. R. 964.

(*c*) *Purves* v. *Landell* (1845), 12 C. & F. 91, H. L. ; *Chapman* v. *Van Toll, Van Toll* v. *Chapman* (1857), 27 L. J. Q. B. 1 ; 8 E. & B. 396 ; *Dooby* v. *Watson* (1888), 39 Ch. D. 178 ; 57 L. J. Ch. 865 ; *Lowry* v. *Guilford* (1832), 5 C. & P. 234 ; 38 R. R. 818 ; *Pitt* v. *Yalden*, 4 Burr. 2060.

(*d*) *Ireson* v. *Pearman* (1825), 3 L. J. (o.s.) K. B. 119 ; 3 B. & C. 799.

(*e*) *Pitman* v. *Francis* (1884), 1 C. & E. 355.

(*f*) *Purves* v. *Landell* (1845), 12 C. & F. 91, H. L. ; *Barker* v. *Fleetwood* (1890), 6 T. L. R. 430, C. A. ; *Faithfull* v. *Kesteven* (1910), 103 L. T. 56, C. A.

(*g*) *Laidler* v. *Elliott* (1825), 3 B. & C. 738 ; *Bulmer* v. *Gilman* (1842), 4 M. & G. 108.

(*h*) *Godefroy* v. *Dalton* (1830), 6 Bing. 460 ; *Kemp* v. *Burt* (1833), 2 L. J. K. B. 69 ; 4 B. & Ad. 424 ; *Hawkins* v. *Harwood* (1849), 4 Ex. 503 ; *De Roufigny* v. *Peale* (1811), 3 Taunt. 484.

(*i*) *Hart* v. *Frame* (1839), 6 Cl. & F. 193, H. L.

(*k*) *Reece* v. *Rigby* (1821), 4 B. & A. 202.

(*l*) *Godefroy* v. *Jay* (1831), 7 Bing. 413.

(*m*) *Re Partington, Partington* v. *Allen* (1887), 57 L. T. 654 ; *Pretty* v. *Fowke* (1887), 3 T. L. R. 845 ; *Craig* v. *Watson* (1845), 8 Beav. 427. See also *Nocton* v. *Ashburton*, [1914] A. C. 932 ; 83 L. J. Ch. 784, H. L.

of an assignment of a chose in action (*n*) ; for omitting to make proper inquiries and searches in an investigation of title (*o*) ; for suing where the Court had no jurisdiction (*p*) ; for not duly filing certain writs, in accordance with the practice of the Court (*q*) ; for not using due diligence to obtain satisfaction of a judgment (*r*) ; for investing trust moneys in improper securities (*s*) ; for omitting to procure the investment of the proceeds of property sold by order of the Court (*t*) ; for not explaining the effect of an unusual covenant in a deed executed by a client (*u*) ; for missing a case which had been transferred to another Judge without the solicitor's knowledge, by order of the Lord Chancellor (*a*) ; and for neglecting to start proceedings within the time limited by the Public Authorities Protection Act, 1893 (*b*). Also for entering into a compromise on behalf of his client contrary to the client's express instructions even though the compromise was reasonable, and was entered into in good faith for the benefit of the client and on the advice of the counsel engaged in the case (*c*).

A solicitor, employed to procure a mortgage, discovers a defect in his client's title, which he afterwards discloses to another client, causing damage to the first-mentioned client. He is liable for the damage caused by his breach of duty (*d*). So, where a solicitor without reasonable cause, or without giving his client reasonable notice of his intention to do so, abandons the prosecution or defence of an action, he is liable to the client for any loss occasioned thereby (*e*). A solicitor instructed by an insurance company acting on behalf of the client is liable for the damage caused when he delivers a defence admitting negligent driving by his client without first obtaining his client's instructions or consent to the admission (*f*). An agreement with the client that a solicitor shall not be liable for negligence in respect of any contentious business, or that he shall be relieved from any responsibility to which he would otherwise be subject, is void (*g*). If property come to a solicitor in consequence of his ignorance, or of a breach of duty on his part, he is a trustee thereof for the persons who would have been entitled if he had known and done his duty. No solicitor is permitted to take advantage of his own ignorance or breach of duty (*h*).

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(*n*) *Bean* v. *Wade* (1885), 2 T. L. R. 157, C. A. ; *Donaldson* v. *Haldane* (1840), 7 C. & F. 762, H. L.

(*o*) *Cooper* v. *Stephenson* (1852), 21 L. J. Q. B. 292 ; *Allen* v. *Clark* (1863), 7 L. T. 781.

(*p*) *Williams* v. *Gibbs* (1836), 5 Ad. & E. 208.

(*q*) *Hunter* v. *Caldwell* (1847), 10 Q. B. 69, 83 ; 16 L. J. Q. B. 274 ; 74 R. R. 203, Ex. Ch.

(*r*) *Russell* v. *Palmer* (1767), 2 Wils. 325.

(*s*) *Blyth* v. *Fladgate*, *Morgan* v. *Blyth*, *Smith* v. *Blyth*, [1891] 1 Ch. 337 ; 60 L. J. Ch. 66.

(*t*) *Batten* v. *Wedgwood Coal Co.* (1886), 2 T. L. R. 236.

(*u*) *Stannard* v. *Ullithorn* (1834), 3 L. J. C. P. 307 ; 10 Bing. 491.

(*a*) *Burgoine* v. *Taylor* (1878), 9 Ch. D. 1 ; 47 L. J. Ch. 542, C. A.

(*b*) 56 & 57 Vict. c. 61 ; *Fletcher* v. *Jubb*, [1920] 1 K. B. 275 ; 89 L. J. K. B. 236, C. A. : see now Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 21.

(*c*) *Butler* v. *Knight* (1867), L. R. 2 Ex. 109 ; 36 L. J. Ex. 66 ; *Fray* v. *Voules* (1859), 1 El. & El. 839 ; 28 L. J. Q. B. 232 ; *The Hermoine*, [1922] P. 162 ; 91 L. J. P. 136.

(*d*) *Taylor* v. *Blacklow* (1836), 3 Scott 614. See also *Barber* v. *Stone* (1881), 50 L. J. Q. B. 297.

(*e*) *Hoby* v. *Built* (1832), 3 B. & Ad. 350.

(*f*) *Groom* v. *Crocker*, [1939] 1 K. B. 194 ; See Appendix.

(*g*) Solicitors Act, 1932 (22 & 23 Geo. 5, c. 37), s. 60 (2).

(*h*) *Bulkley* v. *Wilford* (1834), 2 Cl. & F. 102, H. L.

*Illustrations*

*Disobedience to instructions*

1. An agent was instructed, and undertook, to warehouse certain goods at a particular place. He warehoused a portion of such goods at another place, where they were destroyed without negligence. Held, that the loss of the goods was a natural consequence of the agent's disobedience to instructions, and that he was liable to the principal for their value (*i*).

2. An agent, instructed to insure goods, neglects to do so. He is liable to the principal for their value if they be lost (*k*).

3. An outside broker was employed to buy shares on the stock exchange. He accepted the employment, and sent a bought note, but did not actually buy the shares. Held, that it was not a wagering contract, and that he was liable to pay damages for breach of duty (*l*).

*Negligence and other breaches of duty*

4. An agent pays his principal's money into his own account at the bank, it being his duty to pay it into a separate account. He is responsible for the failure of the banker (*m*), though the agent is acting gratuitously (*n*).

5. A broker was authorised to sell and deliver certain goods. He contracted to sell them for cash on delivery. Held, that he was liable to the principal in damages for having delivered the goods without payment (*o*).

6. A broker is authorised to sell goods at a certain price. He sells them at a lower price. He is liable to the principal in damages for the breach of duty (*p*). So, a broker who sold goods by auction at much below their real value, not having made an estimate of the value in accordance with usage, was held liable in an action for negligence (*q*).

7. An auctioneer takes a bill of exchange in payment of the price of goods sold by him. He is liable to the principal for the amount, if the bill be dishonoured (*r*). So, where a house agent, who was instructed by a lessor not to part with a written licence (authorising an assignment of the lease) until the lessee had paid the rent due, accepted a cheque for the rent and gave up the licence to the lessee, and the cheque was dishonoured, the agent was held liable to the lessor for the full amount of the rent (*s*).

8. A London banker receives bills from a correspondent in the country, to be presented for payment. He gives up the bills to the acceptor, in exchange for a cheque for the amount, that being the usual and ordinary course amongst

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(*i*) *Lilley* v. *Doubleday* (1881), 7 Q. B. D. 510 ; 51 L. J. Q. B. 310, C. A.
(*k*) *Smith* v. *Lascelles* (1788), 2 T. R. 187.
(*l*) *Re Hewett, ex p. Paddon* (1893), 9 T. L. R. 166, C. A.
(*m*) *Wren* v. *Kirton* (1805), 11 Ves. 377 ; 8 R. R. 174 ; *Robinson* v. *Ward* (1825), 2 C. & P. 59 ; *MacDonnell* v. *Harding* (1834), 4 L. J. Ch. 10 ; 7 Sim. 178 ; 40 R. R. 95.
(*n*) *Massey* v. *Banner* (1820), 1 Jac. & W. 241 ; 21 R. R. 150.
(*o*) *Boorman* v. *Brown* (1842), 3 Q. B. 511 ; 11 C. & F. 1. And see *Kidd* v. *Horne* (1885), 2 T. L. R. 141.
(*p*) *Dufresne* v. *Hutchinson* (1810), 3 Taunt. 117.
(*q*) *Solomon* v. *Barker* (1862), 2 F. & F. 726.
(*r*) *Ferrers* v. *Robbins* (1835), 2 C. M. & R. 152.
(*s*) *Papé* v. *Westacott*, [1894] 1 Q. B. 272 ; 63 L. J. Q. B. 222, C. A.

bankers. The cheque is dishonoured. The banker is not liable in an action for negligence, having acted in the ordinary course of business and in accordance with usage (*t*).

9. An agent is not liable for failing to exercise extra care and diligence beyond his reasonable duty. A contracted to lighter and load certain machinery, and pass it through the Custom House. It was common knowledge that import duties were about to be imposed on machinery, and A might have cleared it in time to escape the taxation, but did not do so, though he cleared it within the time prescribed by the Customs regulations. In an action against A for the amount of the duty paid, it was held that there was no evidence to go to the jury of any negligence or breach of duty for which he would be liable (*u*).

10. A shipmaster signs a bill of lading which is incorrectly dated. He is liable to his principals in an action for negligence (*a*).

11. An auctioneer sells property under conditions requiring the payment of an immediate deposit. He is liable in damages if he negligently permit the highest bidder to go away without paying the deposit (*b*).

12. An auctioneer, having sold property, rescinds the contract of sale without the authority of the vendor. He is liable to the vendor for damages (*c*).

*Insurance Brokers*

13. Actions for negligence against insurance brokers have been held to lie—(1) for not effecting a policy within a reasonable time (*d*) ; (2) for an omission to insert a clause usually inserted when insuring from a particular point (*e*) ; and (3) for an omission to communicate a material letter to the underwriters, in consequence of which the principal failed in an action on the policy (*f*). But, where a broker acts in good faith and in accordance with usage in effecting a policy, the mere fact that the insurance might possibly have been effected on better terms is not sufficient to render the broker liable to the principal for damages. To render him liable, it must appear that he has been guilty of negligence or of some breach of duty (*g*). An insurance broker was employed to insure certain goods from a particular point in the voyage. He insured them "at and from that point, beginning the adventure from the loading thereof on board". Held, that he had been guilty of negligence, for the consequences of which he was liable to his principal (*h*).

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(*t*) *Russell* v. *Hankey* (1794), 6 T. R. 12 ; *Wilts and Dorset Bank* v. *Cook* (1889), 5 T. L. R. 703. Comp. *Bank of Scotland* v. *Dominion Bank*, [1891] A. C. 592, H. L. Sc.

(*u*) *Commonwealth Portland Cement Co.* v. *Weber*, [1905] A. C. 66 ; 74 L. J. P. C. 25, P. C.

(*a*) *Stumore* v. *Breen* (1886), 12 App. Cas. 698 ; 56 L. J. Q. B. 401, H. L.

(*b*) *Hibbert* v. *Bayley* (1860), 2 F. & F. 48 ; comp. *Andrade* v. *Sotheby* (1931), 47 T. L. R. 244.

(*c*) *Nelson* v. *Aldridge* (1818), 2 Stark. 435.

(*d*) *Turpin* v. *Bilton* (1843), 5 M. & G. 455 ; 12 L. J. C. P. 167.

(*e*) *Mallough* v. *Barber* (1815), 4 Camp. 150.

(*f*) *Maydew* v. *Forrester* (1814), 5 Taunt. 615.

(*g*) *Moore* v. *Morgue* (1776), Cowp. 479 ; *Comber* v. *Anderson* (1808), 1 Camp. 523. And see *Nitrate Producers' Co.* v. *Wills* (1905), 21 T. L. R. 699, H. L.

(*h*) *Park* v. *Hammond* (1816), 6 Taunt. 495. See also *Dickson* v. *Devitt* (1916), 86 L. J. K. B. 315.

*Company Directors*

14. The directors of a company knowingly or negligently (*i*) pay dividends out of the capital. Such a payment is a misapplication of the funds of the company, and the directors are jointly and severally liable to repay the amount to the company, with interest (*k*). But they are not liable if the dividends were paid in reliance on information furnished by the officials of the company, on which in the ordinary course of business the directors were entitled to rely (*l*).

15. The directors of a limited company, whose object was to purchase a certain business, were authorised by the articles of association " to purchase or acquire the said business as it then stood, upon such terms and under such stipulations as might be agreed upon". The business was insolvent. Held, that the directors were not liable, in the absence of gross negligence, for the consequences of so carrying out the object of the company, they being authorised to purchase the business as it stood, which was an act in itself imprudent (*m*).

16. *Negligence of gratuitous agent.*—A customer deposited certain securities with his bankers for safe keeping, the bankers receiving no reward for taking care of them. The securities were stolen by a clerk in the bankers' employ. Held, that the bankers, having acted gratuitously, were not liable, there being no evidence of gross negligence on their part (*n*).

## Article 58

MEASURE OF DAMAGES FOR NEGLIGENCE OR OTHER BREACH OF DUTY

The measure of damages in an action by a principal against his agent for negligence or any other breach of duty by the agent in the course of the agency is the loss actually sustained by the principal, provided that it was the natural and probable consequence of the breach or such loss as in the particular circumstances the agent might reasonably have expected to result from such negligence or breach of duty (*o*).

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(*i*) See *Dovey* v. *Corey*, [1901] A. C. 477 ; 70 L. J. Ch. 753, H. L. ; *Lucas* v. *Fitzgerald* (1903), 20 T. L. R. 16.

(*k*) *Re Oxford Building Society* (1886), 35 Ch. D. 502 ; 56 L. J. Ch. 98 ; *Flitcroft's Case* (1882), 21 Ch. D. 519 ; 52 L. J. Ch. 217, C. A. ; *Re Bennett* (1892), 8 T. L. R. 194, C. A. ; *Leeds Estate Co.* v. *Shepherd* (1887), 36 Ch. D. 787 ; 57 L. J. Ch. 46. As to the liability of shareholders receiving the dividends, see *Moxham* v. *Grant*, [1900] 1 Q. B. 88 ; 69 L. J. Q. B. 97, C. A. ; *Towers* v. *African Tug Co.*, [1904] 1 Ch. 558 ; 73 L. J. Ch. 395, C. A. ; *Lucas* v. *Fitzgerald* (1903), 20 T. L. R. 16.

(*l*) See note (*i*), above ; *Préfontaine* v. *Grenier*, [1907] A. C. 101 ; 76 L. J. P. C. 4, P. C.

(*m*) *Overend* v. *Gibb* (1872), L. R. 5 H. L. 480 ; 42 L. J. Ch. 67, H. L.

(*n*) *Giblin* v. *McMullen* (1869), L. R. 2 P. C. 317 ; 38 L. J. P. C. 25, P. C. ; *Bullen* v. *Swan Electric Engraving Co.* (1907), 23 T. L. R. 258, C. A. Comp. *Re United Service Co., Johnston's Claim* (1870), L. R. 6 Ch. 212 ; 40 L. J. Ch. 286.

(*o*) *Cassaboglou* v. *Gibb* (1882), 11 Q. B. D. 797 ; 52 L. J. Q. B. 538, C. A. ; *Salnesen* v. *Rederi Aktiebolaget Nordstjernam*, [1905] A. C. 302 ; 74 L. J. P. C. 96 ; *Johnston* v. *Braham*, [1917] 1 K. B. 586 ; 86 L. J. K. B. 613, C. A. ; *Re United Service Co., Johnston's Claim* (1870), L. R. 6 Ch. 212 ; 40 L. J. Ch. 286 ; *Hadley* v. *Baxendale* (1854), 9 Ex. 341 ; 23 L. J. Ex. 182, C. A. And see Illustrations and Article 57, Illustration 7. See Appendix.

*Illustrations*

1. A commission agent in Hong Kong was instructed to purchase a quantity of a certain kind of opium. He purchased and shipped to his principal opium of an inferior kind. Held, that the proper measure of damages was the loss actually sustained by the principal in consequence of the opium not being of the description ordered, and not the difference between the value of the description ordered and of that shipped (*p*).

2. An agent, employed to find freight, reported to his principals that he had concluded a bargain for a charter, when in fact no bargain had been concluded. Held, that the principals were entitled to the actual damage suffered in consequence of having acted upon the misrepresentation, but not to the profit which they would have earned if the representation had been true (*q*). A principal induced by his agent's negligence to enter into a transaction which entails loss may recover from the agent, *inter alia*, compensation for loss of time (*r*).

3. An agent is instructed to insure his principal's goods, and wilfully or negligently omits to do so. He is liable to the same extent as the underwriters would have been if the goods had been duly insured (*s*).

4. An insurance broker, in effecting a policy, omitted to disclose a material letter, in consequence of which his principal failed in an action against some of the underwriters on the policy, and was compelled to make restitution to others who had paid their shares of the loss without action. Held, that the broker was liable for the actual loss sustained by the principal in consequence of the omission, including the amounts so repaid to the underwriters (*t*).

5. A employs B to buy tobacco of the best quality. B delegates his employment to C, who buys an inferior quality. A recovers damages from B for the breach of duty. B is entitled to recover from C the full amount of the damages and costs incurred by him in the action by A (*u*).

6. A solicitor, who was employed to effect a mortgage on a piece of land, neglected to ascertain that a third person had an equitable charge thereon to the extent of £46. The mortgagee was compelled to pay the amount of the charge, on a sale of the property, to enable him to convey it to the purchaser. Held, that £46 was the proper measure of damages for the negligence, in the absence of evidence reducing the amount (*a*).

7. A stockbroker, employed to sell joint stock bank shares, omitted to insert in the contract the number of the shares, or the name of the registered proprietor thereof as required by Leeman's Act (*b*), the omission rendering the contract void. Held, that the principal was entitled to recover, as damages for the breach of duty, the amount he would have obtained for the shares if they had been validly sold (*c*).

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(*p*) *Cassaboglou* v. *Gibb* (1882), 11 Q. B. D. 797 ; 52 L. J. Q. B. 538, C. A.
(*q*) *Salvesen* v. *Rederi Aktiebolaget Nordstjernam*, [1905] A. C. 302 ; 74 L. J. P. C. 96.
(*r*) *Johnston* v. *Braham*, [1917] 1 K. B. 586 ; 86 L. J. K. B. 613, C. A.
(*s*) *Smith* v. *Price* (1862), 2 F. & F. 748 ; *Tickel* v. *Short* (1750), 2 Ves. 238.
(*t*) *Maydew* v. *Forrester* (1814), 5 Taunt. 615.
(*u*) *Mainwaring* v. *Brandon* (1818), 2 Moore 125.
(*a*) *Whiteman* v. *Hawkins* (1878), 4 C. P. D. 13.
(*b*) Banking Companies (Shares) Act, 1867 (30 & 31 Vict. c. 29), s. 1.
(*c*) *Neilson* v. *James* (1882), 9 Q. B. D. 546 ; 51 L. J. Q. B. 369, C. A.

8. An agent was instructed not to part with the possession or control of certain goods until they were paid for. He parted with them, and the purchaser failed to pay the price. Held, that the measure of damages was the value of the goods, which the principal had lost in consequence of the breach of duty (*d*).

9. An agent, acting under a power of attorney, wrongfully transferred to himself certain shares belonging to his principal, in satisfaction of a claim which the principal partly admitted and partly disputed. Held that the principal was entitled to recover the full value of the shares (*e*).

10. Directors of a company wrongfully allotted shares to themselves at an undervalue. It was held that they must account to the company for profits obtained in respect of the shares they had disposed of ; and as to those which they retained, that they were liable to pay by way of damages in respect of the wrongful allotment the difference between the price at which the shares were allotted and their highest market value taken as a whole during the time they held them, which in the circumstances was the market value at the time of the allotment ; but that the damage must not be measured by their value if sold in small lots at different times (*f*).

11. An agent, being instructed to buy certain stock, sells stock of his own to the principal, fraudulently representing that it belongs to third persons. The principal holds the stock for some months after discovering the circumstances, and then resells. The measure of damages for the breach of duty is the difference between the price paid by the principal and the price at which he could have resold at the time when he discovered the fraud, and not the loss ultimately sustained by him (*g*).

12. A stockbroker, having agreed to carry over certain shares to the next settlement, and having made the necessary arrangements with a jobber for that purpose, wrongfully closed the account by selling the shares without the principal's instructions, and the principal gave him notice that he would insist upon performance on settling day. When the shares were sold prices were falling, but they rose again and were higher on settling day than at the time of the sale, having been still higher in the meantime. It was held that the principal was entitled to insist upon performance on settling day, and to measure the damages with reference to the prices on that day (*h*). Whether he could have claimed to assess the damages on the basis of the highest prices between the time of the sale and settling day, *quære* (*h*).

13. A banker wrongfully dishonours the cheque of a trading customer. The jury are entitled to award substantial damages without proof of special or actual damage (*i*). But only nominal damages will be awarded if a customer who is not a trader fails to allege and prove special damage (*k*).

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(*d*) *Stearine Co.* v. *Heintzmann* (1864), 17 C. B. (N.S.) 56.
(*e*) *Dantra* v. *Stiebel* (1863), 3 F. & F. 951.
(*f*) *Shaw* v. *Holland*, [1900] 2 Ch. 305 ; 69 L. J. Ch. 621, C. A.
(*g*) *Waddell* v. *Blockey* (1879), 4 Q. B. D. 678 ; 48 L. J. Q. B. 517.
(*h*) *Michael* v. *Hart*, [1902] 1 K. B. 482 ; 71 L. J. K. B. 265, C. A.
(*i*) *Rolin* v. *Steward* (1854), 23 L. J. P. C. 148 ; 14 C. B. 595 ; *Wilson* v. *United Counties Bank*, [1920] A. C. 102 ; 88 L. J. K. B. 1033, H. L.
(*k*) *Gibbons* v. *Westminster Bank*, [1939] 2 K. B. 882 ; 108 L. J. K. B. 841.

14. A pays £400 to his bankers for the specific purpose of providing for a certain bill, he being then indebted to them in a larger amount. The bankers place the amount to his credit, and dishonour the bill. A becomes bankrupt. The trustee in bankruptcy is entitled to recover from the bankers, as damages for the breach of duty, the full amount of the bill (*l*).

15. An agent wrongfully abandoned his agency. Held, that the jury were entitled to award compensation for loss of business in consequence of injury done to the principal's credit, and loss in consequence of the suspension of the business, because, although such losses might not arise naturally in the ordinary course of things, they were such as, in the circumstances, the agent might reasonably have expected to result as a consequence of the breach of duty (*m*). But it seems doubtful if this would be the result to-day in view of the *dicta* of Willes, J., in *British Columbia, etc., Co.* v. *Nettleship* (*n*).

16. Estate agents, employed to find a purchaser, procured an offer from A which their principal accepted, subject to contract. B then made an offer to the agents to purchase the property from A at an increased price. The agents did not inform the principal of B's offer ; and the principal, in ignorance of that offer, concluded a contract of sale with A. Held, that the measure of damages, for the agents' breach of duty in failing to inform their principal of B's offer, was the difference between the price agreed with A and that offered by B (*o*).

17. A principal employed an agent to investigate the affairs of a company in which he was interested. In a letter of instructions to the agent, the principal made libellous statements concerning two officers of the company. Through the agent's negligence the letter was left at the company's office and its contents communicated to the two officers. In a libel action brought by the officers the principal was held liable, his defence of qualified privilege being rebutted by proof of malice. The principal sued the agent for the damages and costs he had suffered and incurred. Held, by a majority of the House of Lords, that he could only recover nominal damages as the principal's liability in the libel action was not the natural and probable consequence of the agent's breach of duty (*p*).

18. *Damage must be legal damage.*—A employs B, a turf commission agent, to make bets on his behalf. B undertakes the commission, and neglects to make the bets. A has suffered no legal damage, because the bets would have been void, and A would not have been able to recover them by action, even if B had duly made them on his behalf. A therefore cannot maintain an action against B for breach of duty, though it may be customary to pay such debts without action (*q*). So, where an agent who was instructed to insure certain slaves neglected to do so, it was held that he was not liable to his principal in an action for negligence, although it was customary for underwriters to pay in respect of such a policy, because, by reason of its illegality,

(*l*) *Hill* v. *Smith* (1844), 13 L. J. Ex. 243 ; 12 M. & W. 618.
(*m*) *Boyd* v. *Fitt* (1864), 11 L. T. 280.
(*n*) (1868), L. R. 3 C. P. 499, 509 ; 37 L. J. C. P. 235.
(*o*) *Keppel* v. *Wheeler*, [1927] 1 K. B. 577 ; 96 L. J. K. B. 433, C. A.
(*p*) *Weld-Blundell* v. *Stephens*, [1920] A. C. 956 ; 89 L. J. K. B. 705, H. L.
(*q*) *Cohen* v. *Kittell* (1889), 22 Q. B. D. 680 ; 58 L. J. Q. B. 241.

the principal would have been unable to recover upon the policy at law (*r*). So, where insurance brokers obtained a policy which was in a form which rendered it void as a p.p.i. policy, the form being in accordance with their instructions, but they negligently failed to disclose a certain risk, and the underwriters repudiated liability on the ground of non-disclosure, it was held that the policy-holders had suffered no damage (*s*).

19. *Nominal damages, though no actual loss.*—An agent is instructed to present a bill for acceptance. He neglects to do so. The principal is entitled to recover nominal damages for the breach of duty, though he suffered no actual loss thereby, the bill having been paid by other parties thereto. In such a case legal damage is presumed (*t*).

## Article 59

### LIABILITY OF AGENTS ACCEPTING BRIBES

Where an agent accepts any money or property in the course of his agency by way of a bribe, he is liable to account for the money, or for the highest value of the property while in his possession, whether or not he had been influenced by the bribe to depart from his duty, and to pay over the amount as money received to the use of the principal (*u*), with interest at the rate of five per cent. per annum from the date of the receipt of the bribe ; and where he has been induced by the bribe to depart from his duty to the principal, he is also liable, jointly and severally with the person who bribed him, to make good any loss suffered by the principal in consequence of such departure from duty, without taking into consideration the amount of the bribe so accounted for or paid over to the principal (*x*), and to forfeit any commission or remuneration which would otherwise have been payable to him (*a*).

The claim of a principal in respect of a bribe received by his agent is barred by the Limitation Act, 1939, in equity as well as at law, after the expiration of six years from the time when the principal became aware of the bribery (*b*).

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(*r*) *Webster* v. *De Tastet* (1797), 7 T. R. 157. See also *Duncan* v. *Skipwith* (1809), 2 Camp. 68 ; *Weld-Blundell* v. *Stephens*, [1920] A. C. 956 ; 89 L. J. K. B. 705, H. L. ; *Bradstreets British, Ltd.* v. *Mitchell*, [1933] Ch. 190 ; 102 L. J. Ch. 34 ; *Howard* v. *Odhams Press, Ltd.* (1937), 106 L. J. K. B. 675.

(*s*) *Cheshire* v. *Vaughan*, [1920] 2 K. B. 240 ; 89 L. J. K. B. 1168, C. A.

(*t*) *Van Wart* v. *Woolley* (1830), M. & M. 520.

(*u*) See *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549 ; 47 L. J. Q. B. 594.

(*x*) Illustration 1 ; *Morgan* v. *Elford* (1876), 4 Ch. D. 352 ; *Phosphate Sewage Co.* v. *Hartmont* (1877), 5 Ch. D. 394, 448, C. A. ; *Cohen* v. *Kushke* (1900), 83 L. T. 102 ; *E. I. Co.* v. *Henchman* (1791), 1 Ves. jun. 289. And see the Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69), s. 2 (b), for power of the Court to order the recipient of a bribe, who has been convicted under that Act, to pay the amount or value of the bribe to the public body concerned. As to the rights of the principal against third persons in cases of bribery, see Article 114.

(*a*) See Article 70.

(*b*) (2 & 3 Geo. 6 c. 21), s. 19. *Metropolitan Bank* v. *Heiron* (1880), 5 Ex. D. 319, C. A.

The principal is justified in dismissing without notice any agent who accepts a bribe in the course of his agency (*c*).

A bribe has been defined as follows : " If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal, and that gift is secret as between the donor and the agent—that is to say without the knowledge and consent of the principal—then the gift is a bribe in the view of the law " (*d*). The Courts will presume when a secret commission is paid to an agent that the motive of the donor is corrupt and this presumption is irrebuttable ; it will also be assumed that damage, at least to the extent of the bribe, is caused (*e*).

*Criminal Liability*

An agent who accepts, or agrees to accept a bribe, is, at common law, guilty of the misdemeanour of conspiracy (*f*).

By the Prevention of Corruption Act, 1906 (*g*), s. 1, if any agent (*h*) corruptly (*i*) accepts, or obtains, or agrees to accept, or attempts to obtain, for himself or for any other person, any gift or consideration (*k*), as an inducement or reward for doing, or forbearing to do, or for having done, or forborne to do any act in relation to his principal's (*l*) affairs (*m*) or business, or for showing or forbearing to show favour or disfavour to any person, in relation thereto, he is guilty of a misdemeanour. Any person who corruptly gives, or agrees to give, or offers any such gift or consideration is similarly guilty (*n*).

*Illustrations*

1. An agent, in consideration of a bribe, induces his principal to contract with the person bribing him. The principal is entitled to recover from the agent the amount of the bribe, as money received to his use, and from the

(*c*) Illustration 4 ; and see *Bulfield* v. *Fournier* (1896), 11 T. L. R. 282, C. A. ; *Swale Ipswich Tannery* (1906), 11 Com. Cas. 88.

(*d*) *Hovenden* v. *Millhoff* (1900), 83 L. T. 41, C. A.

(*e*) *Industries & General Mortgage Co.* v. *Lewis*, [1949] 2 All E. R. 573.

(*f*) *R.* v. *Whitaker*, [1914] 3 K. B. 1283, C. C. A. ; *R.* v. *Barber* (1887), 3 T. L. R. 491. See also *R.* v. *De Kromme* (1892), 66 L. T. 301 (person offering bribe guilty of inciting to conspire).

(*g*) 6 Edw. 7, c. 34. See also the Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69).

(*h*) Includes any person employed by or acting for another : s. 1 (2) ; and also any person serving under the Crown or under any corporation or any municipal borough, county or district council : s. 1 (3), or under any local or public authority : Prevention of Corruption Act, 1916 (6 & 7 Geo. 5, c. 64), s. 4.

(*i*) Where the consideration has been received by an employee of His Majesty or of a Government Department or public body (including any local or public authority) from a person, or the agent of a person, holding, or seeking, a contract from His Majesty or from a Government Department or public body, corruption is presumed until the contrary is proved : Act of 1916, ss. 2, 4 ; *R.* v. *Jenkins* (1923), 87 J. P. 115. It is sufficient to establish the contrary by reasonable probability : *R.* v. *Carr-Briant*, [1943] K. B. 607 ; 112 L. J. K. B. 581.

(*k*) Includes valuable consideration of any kind : 1906 Act, s. 1 (2).

(*l*) Includes an employer ; *ibid.*

(*m*) Pecuniary interest need not be involved : *Att.-Gen.* v. *Goddard* (1929), 98 L. J. K. B. 743.

(*n*) 1906 Act, s. 1 (1). The sub-section also provides against the use of documents containing false statements, with intent to deceive the principal.

agent and the person bribing him, jointly and severally, any loss incurred through having been so induced to contract (*o*).

2. An information will lie against a servant of the Crown for secret profits made in the course of his employment, although no pecuniary interest of the Crown is involved (*p*).

3. A sergeant in the army stationed at Cairo on several occasions while in uniform, boarded a lorry loaded with cases, the contents of which were unknown, and escorted it through Cairo, thus enabling it to pass the civilian police without being inspected. On each occasion the sergeant was paid a large sum of money by a civilian; the military authorities took possession of the money and the sergeant petitioned the Crown for its return. Held, the Crown was entitled to the money. The sergeant was intrusted with his uniform to be used solely in the course of his employment for the benefit of the Crown, his use of it in these circumstances was a breach of his duty owed to the Crown, and since he obtained the money from this breach of duty, the Crown could retain it (*q*).

4. A director of a company, who was a shareholder in two other companies, accepted bonuses from such other companies, in consideration of his giving them orders for goods on behalf of the first company. The articles of association provided that the directors might contract with the company. Held, that the bonuses were bribes ; that the director must account to the company for them, with interest ; and that the bribery justified the dismissal of the director, although it was not discovered until after the dismissal (*r*).

5. The secretary of a company, when making a contract on behalf of the company with the vendor, stipulated that he should receive, and subsequently did receive, from the vendor, 600 fully-paid up shares. Held, that he must account to the company for the highest value borne by the shares during the the time they were held by him, which in this case was assumed to be the nominal value (*s*).

6. A director of a company, before the transactions between the promoter and the company have been finally completed, accepts his qualification shares from the promoter. The director must account to the company for the highest value attributable to the shares during the time they are held by him, with interest on such value from the date the shares were transferred to him to the date of the action (*t*). So, if a director receive the money to pay for his qualification shares, he must account for the amount received, with interest from the date of its receipt (*u*). Where a promoter sold shares to a director,

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(*o*) *Salford Corporation* v. *Lever*, [1891] 1 Q. B. 168 ; 60 L. J. Q. B. 39, C. A. ; *Hovenden* v. *Millhoff* (1900), 83 L. T. 41, C. A.

(*p*) *Att.-Gen.* v. *Goddard* (1929), 98 L. J. K. B. 743.

(*q*) *Reading* v. *Att.-Gen.* [1951] 1 T. L. R. 480.

(*r*) *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339, C. A. ; *Temperley* v. *Blackrod Manufacturing Co., Ltd.* (1907), 71 J. P. 341.

(*s*) *McKay's Case* (1875), 2 Ch. D. 1 ; 45 L. J. Ch. 148, C. A.

(*t*) *Nant-y-glo Iron Co.* v. *Grave* (1878), 12 Ch. D. 738 ; *Pearson's Case* (1877), 5 Ch. D. 336 ; 46 L. J. Ch. 339, C. A. ; *Eden* v. *Ridsdale's Lamp Co.* (1889), 58 L. J. Q. B. 597, C. A. ; *Mitcalfe's Case* (1879), 13 Ch. D. 169 ; 49 L. J. Ch. 301, C. A.

(*u*) *Hay's Case* (1875), L. R. 10 Ch. 593 ; 44 L. J. Ch. 721 ; *McLean's Case* (1885), 55 L. J. Ch. 36.

the director was compelled to account for the difference between the nominal value of the shares and the price he paid for them (*a*).

7. An agent, who was employed to purchase goods, accepted large sums from the vendor by way of bribery, and invested part of the amount. The principal claimed to follow the money, and prayed for an injunction to restrain the agent from dealing with the investment, and an order directing him to bring the amount into Court. Held, that the relation between the parties was that of debtor and creditor, not that of trustee and *cestui que trust*, and that the plaintiff was not entitled to follow the money (*b*).

## Article 60

### WHEN LIABLE TO PAY INTEREST

An agent is not generally liable to pay interest upon money received by him to the use of his principal, except where he receives or deals with the money improperly, and in breach of his duty (*c*), or refuses to pay it over to the principal on demand (*d*). An agent who receives or deals with the money of his principal improperly, and in breach of his duty, or who refuses to pay it over on demand, is liable to pay interest from the time when he so receives or deals with the same, or from the time of the demand, as the case may be (*c*).

By the Law Reform (Miscellaneous Provisions) Act, 1934, (*e*) s. 3, Courts of Record are empowered to give interest upon the amount of debt or damages for which judgment is given, or upon part of that amount, at such rate as the Court thinks fit, for the whole or part of the period between the date when the cause of action arose and the date of judgment.

As a general rule, where an agent applies the principal's money to his own use, he is bound to pay interest thereon, it being his duty to act in the agency solely for the principal's benefit (*f*). An agent is bound to pay interest upon bribes (*g*) and profits made in the course of his agency without the principal's knowledge (*h*), and in all cases of fraud or wilful concealment (*i*).

*Illustrations*

1. An agent, at the request of his principal, retained large sums of money in his hands, and duly accounted for the same. Held, that he was not liable to pay interest, though he had made use of the money for his own purposes (*k*).

(*a*) *Weston's Case* (1879), 10 Ch. D. 579 ; 48 L. J. Ch. 425, C. A.
(*b*) *Lister* v. *Stubbs* (1890), 45 Ch. D. 1 ; 59 L. J. Ch. 570, C. A. ; *Powell* v. *Jones*, [1905] 1 K. B. 11 ; 74 L. J. K. B. 115, C. A.
(*c*) *Wolfe* v. *Findlay* (1847), 16 L. J. Ch. 241 ; 6 Hare 66 ; *Fry* v. *Fry* (1864), 10 Jur. (N.S.) 983. Illustrations 1 to 5.
(*d*) *Barclay* v. *Harris* (1915), 85 L. J. K. B. 115 ; *Harsant* v. *Blaine* (1887), 56 L. J. Q. B. 511, C. A. ; *Pearse* v. *Green* (1819), 1 Jac. & W. 135. Illustration 5.
(*e*) 24 & 25 Geo. 5, c. 41.
(*f*) *Rogers* v. *Boehm* (1799), 2 Esp. 704. Illustration 1.
(*g*) Article 59, Illustrations 4 and 6.
(*h*) *Benson* v. *Heathorn* (1842), 1 Y. & Coll. C. C. 326 ; *Tyrell* v. *Bank of London* (1862), 10 H. L. Cas. 26 ; 31 L. J. Ch. 369.
(*i*) *Hardwicke* v. *Vernon* (1808), 14 Ves. 504.
(*k*) *Chedworth* v. *Edwards* (1802), 8 Ves. 48.

2. A solicitor was authorised by power of attorney to sell certain property and invest the proceeds. He paid the proceeds into the account of his firm, who made use of the money. Held, that he must pay interest at the rate of five per cent. (*l*).

3. An agent, who undertook to invest his principal's money in the funds, kept large balances in his hands. Held, that he must pay interest on such balances (*m*).

4. An agent had the entire management of his principal's affairs for many years without being called upon for an account. Errors were then discovered, and upon a bill being filed for an account, a large sum was found to be due. Held, that, in the absence of fraud, the agent was not liable to pay interest upon the balances in his hands (*n*).

5. The solicitor of the vendor at a sale by auction received a deposit as the agent of the vendor. Held, that he was liable to pay interest thereon from the date of a demand made by the vendor (*o*). But a stakeholder is not liable to pay interest, even where he uses, and himself obtains interest on, the money. Thus, where an auctioneer received a deposit, and invested and obtained interest upon the amount, it was held that he was not liable to pay over the interest on the completion of the sale. In this respect, there is an essential difference between an agent and a stakeholder (*p*).

## Article 61

### LIABILITY TO ATTACHMENT

Where an agent is ordered to pay over money received by him in a fiduciary capacity, he may at the discretion of the Court be attached, on default in such payment, though he may have parted with the money, or become a bankrupt or insolvent (*q*).

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(*l*) *Burdick* v. *Garrick* (1869), L. R. 5 Ch. 233 ; 39 L. J. Ch. 369.

(*m*) *Brown* v. *Southouse* (1790), 3 Bro. C. C. 107 ; *Barwell* v. *Parker* (1751), 2 Ves. 364.

(*n*) *Turner* v. *Burkinshaw* (1867), L. R. 2 Ch. 488, such a case would now be within the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 : see note (*d*), above.

(*o*) *Edgell* v. *Day* (1865), L. R. 1 C. P. 80 ; 35 L. J. C. P. 7.

(*p*) *Harington* v. *Hoggart* (1830), 9 L. J. (o.s.) K. B. 14 ; 1 B. & Ad. 577 ; 35 R. R. 382.

(*q*) Debtors Act, 1869, s. 4 (3) ; *Marris* v. *Ingram* (1879), 13 Ch. D. 338 ; 49 L. J. Ch. 123 ; *Crowther* v. *Elgood* (1887), 34 Ch. D. 691 ; 56 L. J. Ch. 416, C. A. (auctioneer attached for not paying over the price of goods sold by him) ; *Litchfield* v. *Jones* (1887), 36 Ch. D. 530 ; 57 L. J. Ch. 100 (town agent, in an action for an account of his agency by country solicitor) ; *Lewes* v. *Barnett* (1878), 6 Ch. D. 252 ; 47 L. J. Ch. 144, C. A. ; *Preston* v. *Etherington* (1887), 4 T. L. R. 47, C. A. ; *Re Smith. Hands* v. *Andrews* (1893), 9 T. L. R. 238, C. A. See also *Re Edye* (1891), 63 L. T. 762 ; *Re Dudley, ex p. Monet* (1883), 12 Q. B. D. 44 ; 53 L. J. Q. B. 16, C. A. ; *Re Grey* (1892), 8 T. L. R. 694, C. A. ; *Re Wray* (1887), 36 Ch. D. 138 ; 56 L. J. Ch. 1106 ; *Re Barfield* (1871), 24 L. T. 248 ; *Tilney* v. *Stansfield* (1880), 28 W. R. 582, as to the attachment of solicitors for default in payment of money due from them as officers of the Court. As to criminal liability of an agent who fraudulently misappropriates or deals with money or goods intrusted to him as such, see Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), ss. 20, 22.

## Article 62

### LIABILITY FOR ACTS OF SUB-AGENTS AND CO-AGENTS

Every agent who employs a sub-agent is liable to the principal for money received by the sub-agent to the principal's use (*r*), and is responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment (*s*) ; but co-agents, not being partners, are not, as such, responsible to the principal for the acts or defaults of each other (*t*).

The general rule of law, that an agent is responsible for the acts of a sub-agent employed by him, is not confined to cases where the principal supposes that the agent will act in person (*u*), but applies even where the sub-agent is appointed with the principal's knowledge (*a*).

*Illustrations*

1. A solicitor is liable to his client for the negligence of his town agent (*b*).

2. A banker was employed to obtain payment of a bill of exchange. His agent obtained payment, and became bankrupt before handing the money over. Held, that the banker was liable to his customer for the amount (*u*).

3. A employs B, as an agent, to make advances upon goods. B employs C to make the advances, and authorises him to draw upon A for the amounts. C fraudulently draws upon A for an amount which he has not advanced. B is liable to A for the fraudulent act of C in the course of his employment (*c*).

4. Moneys are handed, with the approbation of the secretary of a company, to the secretary's private clerk, who is not an officer of the company. The clerk misappropriates the money. The secretary is liable to the company for the amount so misappropriated (*d*).

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(*r*) *Matthews* v. *Haydon* (1796), 2 Esp. 509 ; *Re Mitchell* (1884), 54 L. J. Ch. 342 ; *National Employers', etc., Insurance Assn.* v. *Elphinstone*, [1929] W. N. 135. See §§ 405, 406 of the American Restatement.

(*s*) *Meyerstein* v. *Eastern Agency Co.* (1885), 1 T. L. R. 595 ; *Lord North's Case*, Dy. 161A ; *Eccossaise S. S. Co.* v. *Lloyd* (1890), 7 T. L. R. 76. See also the doubts of Atkin, L.J., in *Cheshire & Co.* v. *Vaughan Bros. & Co.*, [1920] 3 K. B. 240, C. A. at p. 259. Illustrations 1 to 4.

(*t*) *Cullerne* v. *L. & S. Building Society* (1890), 25 Q. B. D. 485 ; 59 L. J. Q. B. 525, C. A. ; *Perry's Case* (1876), 34 L. T. 716 ; *Land Credit Co.* v. *Fermoy* (1870), L. R. 5 Ch. 763 ; *Lucas* v. *Fitzgerald* (1903), 20 T. L. R. 16. As to the liability of partners, see Article 84. As to the power of trustees and personal representatives to employ agents, without being responsible for their defaults, see Trustee Act, 1925 (15 Geo. 5, c. 19), s. 23.

(*u*) *Mackersy* v. *Ramsays* (1843), 9 C. & F. 818, H. L.

(*a*) *Skinner* v. *Weguelin* (1882), 1 C. & E. 12.

(*b*) *Collins* v. *Griffin* (1734), Barnes 37 ; *Asquith* v. *Asquith* (1885), W. N. 31.

(*c*) *Swire* v. *Francis* (1877), 3 App. Cas. 106 ; 47 L. J. P. C. 18.

(*d*) *Re Mutual Aid Building Society, ex p. James* (1883), 49 L. T. 530.

# CHAPTER VII

## RIGHTS OF AGENTS AGAINST THEIR PRINCIPALS

### SECT. 1.—*Remuneration*

### Article 63

#### FOUNDED ON EXPRESS OR IMPLIED CONTRACT

THE right of an agent to be remunerated for his services is founded upon an express or implied contract between the principal and agent (*a*). A contract for the payment of remuneration may be implied from custom or usage, from the conduct of the principal, or from the circumstances of the particular case (*b*).

Where the remuneration of an agent is provided for by an express contract, no other contract which is inconsistent with the terms thereof, whether founded on custom or otherwise, can be implied (*c*) ; but evidence of a particular custom or usage may be given for the purpose of explaining any ambiguity in the terms of the express contract, or for the purpose of incorporating a provision which is not inconsistent with the terms thereof (*d*).

Where the remuneration of an agent is not provided for by an express contract, but the circumstances of his employment are such that a contract for the payment of remuneration may be implied (*e*), the amount of the remuneration, and the conditions under which it becomes payable, may be ascertained from the custom or usage of the particular business (*f*). Where there is no such custom or usage, the implied contract is to pay reasonable remuneration.

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(*a*) Illustrations 2 and 7. See also §§ 441, 443, 444, 446 of the American Restatement, the word used in this part of the work is " compensation ", a term open to question.

(*b*) Illustrations 1 and 3.

(*c*) Illustrations 4 and 5. And see Article 64, Illustration 11 ; Article 65, Illustration 8 ; *Moore* v. *Maxwell* (1848), 2 C. & K. 554 ; *Marshall* v. *Parsons* (1841), 9 C. & P. 656 ; *Ward* v. *Stuart* (1856), 1 C. B (N.S.) 88 ; *Fullwood* v. *Akerman* (1862), 11 C. B. (N.S.) 737 ; *Biggs* v. *Gordon* (1860), 8 C. B. (N.S.) 638 ; *Battams* v. *Tompkins* (1892), 8 T. L. R. 707, C. A. ; *Caine* v. *Horsefall* (1847), 1 Ex. 519 ; 17 L. J. Ex. 25 ; *Allan* v. *Sundius* (1862), 31 L. J. Ex. 307 ; 1 H. & C. 123 ; *Parker* v. *Ibbetson* (1858), 27 L. J. C. P. 236 ; 4 C. B. (N.S.) 346 ; *Phillips* v. *Briard* (1856), 25 L. J. Ex. 233 ; *Howard* v. *Manx Isles SS. Co.*, [1923] 1 K. B. 110 ; 92 L. J. K. B. 233.

(*d*) See note (*c*), above.

(*e*) Illustrations 1 to 3.

(*f*) Illustration 6. *Cohen* v. *Paget* (1814), 4 Camp. 96 ; *Burnett* v. *Bouch* (1840), 9 C. & P. 620 ; *Broad* v. *Thomas* (1830), 7 Bing. 99 ; *Rucker* v. *Lunt* (1863), 3 F. & F. 959 ; *Baring* v. *Stanton* (1876), 3 Ch. D. 502 ; *Hall* v. *Benson* (1836), 7 C. & P. 711 ; *Kirk* v. *Evans* (1890), 6 T. L. R. 9 ; *Turner* v. *Reeve* (1901), 17 T. L. R. 592 ; *Stubbs* v. *Slater*, [1910] 1 Ch. 632 ; 79 L. J. Ch. 420, C. A.

Service, however long continued, creates no right to remuneration unless there is a contract to pay it ; and such a contract will only be implied where the circumstances are such as to indicate an understanding between the parties that there should be remuneration (*g*).

The mere employment of a professional man, as such, raises a presumption of an intention to remunerate him, and an agreement to do so is implied from such an employment, in the absence of other circumstances rebutting the presumption (*h*).

No barrister has any legal right to recover any fee or remuneration for services rendered by him, as such, nor is any promise to pay him for any such services binding, either at law or in equity (*i*).

The implied contract to pay an agent reasonable remuneration for his services does not arise when there is an express agreement, or one to be inferred from custom, which is inconsistent therewith (*k*). If the express contract for remuneration were a nullity, by reason of its having been made without authority, the agent will not thereby be prevented from recovering upon a *quantum meruit* (*l*). Where there is an implied contract to pay on a *quantum meruit*, regard may be had in fixing the remuneration not only to trade usage, if any, but also to the previous negotiations of the parties (*m*).

*Illustrations*

1. A entered into an agreement in the following terms—" I hereby agree to enter your service as weekly manager, and the amount of payment I am to receive I leave entirely to you "—and served in that capacity for six weeks. Held, that there was an implied contract to make some payment, at all events, and that A was entitled, in an action on a *quantum meruit*, to recover such an amount as the employer, acting in good faith, ought to have awarded (*n*).

2. A committee resolved that any services rendered by A should be taken into consideration, and such remuneration be paid to him as should be deemed right. Held, that no action would lie at the suit of A to recover such remuneration, the resolution importing that the committee were to judge whether any, and, if so, what remuneration was due for his services (*o*).

3. A employs an auctioneer to sell property on his behalf. A contract by A to pay the auctioneer the usual commission is implied (*p*).

4. It was agreed that an agent should receive commission on " all sales effected or orders executed by him". By a usage of trade, no commission was payable in respect of bad debts. Held, that the agent was, nevertheless,

(*g*) *Reeve* v. *Reeve* (1858), 1 F. & F. 280 ; *Foord* v. *Morley* (1859), 1 F. & F. 496. See also *Hulse* v. *Hulse* (1856), 25 L. J. P. C. 177 ; 17 C. B. 711 ; *Loftus* v. *Roberts* (1902), 18 T. L. R. 532, C. A.

(*h*) *Manson* v. *Baillie* (1855), 2 Macq. H. L. Cas. 80. H. L. Illustration 3.

(*i*) *Kennedy* v. *Broun* (1864), 32 L. J. C. P. 137 ; 13 C. B. (N.S.) 677, Ch. App. ; *Re May* (1858), 4 Jur. (N.S.) 1169 ; *Wells* v. *Wells*, [1914] P. 157 ; 83 L. J. P. 81 ; *Re Sandiford*, [1935] Ch. 681 ; 104 L. J. Ch. 335.

(*k*) Illustration 6.

(*l*) *Craven-Ellis* v. *Canons Ltd.*, [1936] 2 K. B. 403 ; 105 L. J. K. B. 767.

(*m*) *Way* v. *Latilla*, [1937] 3 All E. R. 759, H. L.

(*n*) *Bryant* v. *Flight* (1839), 5 M. & W. 114. See also *Jewry* v. *Busk* (1814), 5 Taunt. 302 ; *Bird* v. *M'Gahey* (1849), 2 C. & K. 707.

(*o*) *Taylor* v. *Brewer* (1813), 1 M. & S. 290. See also *Roberts* v. *Smith* (1859), 28 L. J. Ex. 164 ; 4 H. & N. 315.

(*p*) *Miller* v. *Beale* (1879), 27 W. R. 403 ; *Turner* v. *Reeve* (1901), 17 T. L. R. 592.

entitled to commission on all sales effected by him, including those resulting in bad debts, the usage being inconsistent with the terms of the contract (*q*).

5. An agent is employed to find a purchaser for certain property at a fixed commission, to be payable only in the event of success. He is not entitled to a *quantum meruit* in the absence of success, such a claim being excluded by the express contract (*r*). So, where it was agreed that a sailor should be paid a fixed sum, provided he continued to serve, and did his duty, during the whole voyage, it was held that no wages could be claimed, either on a *quantum meruit* or otherwise, in the event of his dying before the completion of the voyage (*s*). On the other hand, where an engineer contracted to perform certain works, calculated to take fifteen months, for a sum of £500, payable by quarterly instalments, and died during the work, it was held that his representatives were entitled to recover two instalments which had accrued due, and were unpaid, at the time of his death (*t*).

6. A London shipbroker negotiated for the hire of a vessel, and a memorandum of charter was duly signed, but the contract afterwards went off. By a custom of the City of London, shipbrokers who negotiate the hire of vessels are entitled to a certain commission on the amount of the freight, where the contracts are completed, the rate of payment being higher than would fairly compensate them for their services ; but are not entitled to any remuneration with respect to contracts which are not completed. Held, that the broker was not entitled to recover either commission or upon a *quantum meruit* for the services rendered, even if the contract went off owing to the act of the principal (*u*).

7. An agent was employed by a principal for the sale of an hotel. The hotel belonged to a limited company and was subject to a mortgage of £15,000. The issued share capital was £10,000 and all the shares except one were held by the principal who was not personally liable on the mortgage. The sale was carried out by means of a sale of the shares. Held, that the agent was entitled to commission on £10,000 and not on £25,000 (*a*).

## Article 64

### COMMISSION ONLY ON TRANSACTIONS DIRECTLY RESULTING FROM THE AGENCY

Where the remuneration of an agent is a commission upon transactions brought about by him, or is only payable in the event of a transaction being brought about by him, he is not entitled

(*q*) *Bower* v. *Jones* (1831), 8 Bing. 65.
(*r*) *Green* v. *Mules* (1861), 30 L. J. C. P. 343 ; *M'Leod* v. *Artola* (1889), 6 T. L. R. 68 ; *Salter's Claim* (1891), 7 T. L. R. 602 ; *Lott* v. *Outhwaite* (1893), 10 T. L. R. 76, C. A. ; Article 65, Illustration 11.
(*s*) *Cutter* v. *Powell* (1795), 6 T. R. 320 ; 3 R. R. 185.
(*t*) *Stubbs* v. *Holywell Ry.* (1867), L. R. 2 Ex. 311 ; 36 L. J. Ex. 166.
(*u*) *Read* v. *Rann* (1830), 8 L. J. (o.s.) K. B. 144 ; 10 B. & C. 438 ; *Broad* v. *Thomas* (1830), 7 Bing. 99 ; *Harley* v. *Nagata* (1917), 34 T. L. R. 124. Cp. *Moor Line* v. *Dreyfus*, [1918] 1 K. B. 89 ; 118 L. T. 87, C. A. ; *Affréteurs Reunis* v. *Walford*, [1919] A. C. 801 ; 88 L. J. K. B. 861, H. L.
(*a*) *Way and Waller* v. *Ryde*, [1944] 1 All E. R. 9 ; 60 T. L. R. 185, C. A.

to be paid such remuneration unless the transaction in respect of which it is claimed is a direct, though not necessarily an immediate, result of his agency (*b*), and is a transaction the bringing about of which was within the scope of his employment (*c*) ; but it is not necessary, in order to entitle him to payment of such remuneration, that he should complete the transaction, or even that he should be acting for the principal at the time of the completion thereof (*d*).

The question whether an agent is entitled to commission upon business arising wholly after his employment has ceased, as a result of his introduction, depends upon the nature and terms of his employment. *Prima facie*, he is not so entitled (*e*).

It is not sufficient for the agent to show that the transaction would not have been entered into but for his introduction. He must show that the introduction is the direct cause of the transaction (*f*).

But if it appear that the agent's introduction is the foundation of the negotiations resulting in an ultimate sale, the principal cannot deprive him of his commission by withdrawing the property from his hands. The proper question for the jury is—" Did the sale really and substantially proceed from the agent's acts ? " (*g*).

*Illustrations*

1. A employs B, a broker, to procure a charterer for a ship. B introduces C, who is also a broker. C introduces D, who negotiates for, but does not enter into, a charterparty. D informs E that the ship is available ; and E charters the ship from A. B has no claim upon A for commission, the transaction being too remote a consequence of his introduction. A custom for a broker to be paid commission in such a case is invalid (*h*).

2. A house agent lets a house for a term of years, the tenant having the option of taking it for a further term. The tenant afterwards, through the intervention of another agent, takes the house for a further term at a different rent. The first-mentioned agent is not entitled to commission in respect of the further term, and a custom to pay commission to the original agent under such circumstances is invalid. He is entitled to commission only upon the rent obtained as a proximate consequence of his own acts (*i*).

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(*b*) Illustration 15. *Bray* v. *Chandler* (1856), 18 C. B. 718 ; *Jeffrey* v. *Crawford* (1890), 7 T. L. R. 618, C. A. ; *Bayley* v. *Chadwick* (1878), 39 L. T. 429, H. L. ; *Beable* v. *Dickerson* (1885), 1 T. L. R. 654. See also §§ 445, 446, 448 of the American Restatement.

(*c*) Illustrations 3 and 4.

(*d*) Illustrations 6 to 14. *Wilkinson* v. *Martin* (1837), 8 C. & P. 1.

(*e*) Illustration 15. *Hilton* v. *Helliwell*, [1894] 2 Ir. R. 94 ; *Boyd* v. *Mathers* (1893), 9 T. L. R. 443, C. A. ; *Morris* v. *Hunt* (1896), 12 T. L. R. 187 ; *Barrett* v. *Gilmour* (1901), 6 Com. Cas. 72 ; *Gerahty* v. *Baines* (1903), 19 T. L. R. 554 ; *Bickley* v. *Browning* (1913), 30 T. L. R. 134.

(*f*) Illustration 6.

(*g*) *Wilkinson* v. *Martin* (1837), 8 C. & P. 1.

(*h*) *Gibson* v. *Crick* (1862), 31 L. J. Ex. 304 ; 1 H. & C. 142. Comp. *Wilkinson* v. *Alston* (1879), 48 L. J. Q. B. 733, C. A.

(*i*) *Curtis* v. *Nixon* (1871), 24 L. T. 706. See also *Ex p. Chatteris* (1874), 22 W. R. 289 ; *Lofts* v. *Bourke* (1884), 1 T. L. R. 58 ; *Millar* v. *Radford* (1903), 19 T. L. R. 575, C. A.

3. An agent is employed to let an estate, and procures a tenant. The tenant subsequently buys the estate without any further communication with the agent. The agent is not entitled to any commission in respect of the sale (*k*).

4. An agent, employed to sell property on commission, is not entitled to commission upon a sale to himself, without express agreement to that effect (*l*).

5. An agent, employed to find a purchaser of property at a specified price, brings it to the notice of a Government department, which acquires it compulsorily, at a lower price and against the wish of the principal. The agent is not entitled to commission (*m*).

6. A entered into an agreement with B in the following terms :—" In case of your introducing a purchaser (of a certain business) of whom I approve, or capital which I should accept, I could pay you five per cent. commission, provided no one else is entitled to commission in respect of the same introduction". B introduced C, who advanced £10,000 by way of loan, and B was duly paid his commission in respect of that advance. Some months afterwards, A and C entered into an agreement for a partnership, C advancing a further £4,000 by way of capital. Held, that B was not entitled to commission on the £4,000, that amount having been advanced in consequence of the negotiations between A and C for a partnership, with which B had nothing to do (*n*).

7. A, who was employed by B to find a purchaser of certain property, introduced C to B. Shortly afterwards B became bankrupt. Further negotiations took place between C and B's trustee in bankruptcy, resulting in a sale of the property. Held, that the sale was brought about by the agent's introduction and that he was entitled to prove in the bankruptcy for the amount of his commission (*o*).

8. An auctioneer and estate agent was employed to sell an estate, a reserve price being fixed, commission to be paid if the estate should be sold. He put it up for sale, but it was not sold. A person who attended the sale afterwards asked the auctioneer who was the owner of the property, was referred by him to the principal, and eventually became the purchaser of the estate. Held, that the auctioneer was the *causa causans* of the sale, and was therefore entitled to his commission, although, before the actual sale, the vendor had withdrawn the property from him (*p*).

9. A house agent was instructed to offer a house for sale, and it was agreed that he should receive 2½ per cent. commission on the price if he found a purchaser, or a guinea for his services if the house was sold without his

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(*k*) *Toulmin* v. *Millar* (1887), 58 L. T. 96, H. L. ; *Nightingale* v. *Parsons*, [1914] 2 K. B. 621 ; 83 L. J. K. B. 742, C. A. ; *Mote* v. *Gould* (1935), 152 L. T. 347.

(*l*) *Hocker* v. *Waller* (1924), 29 Com. Cas. 296.

(*m*) *Hodges* v. *Hackridge Park Residential Hotel, Ltd.*, [1940] 1 K. B. 404 ; 109 L. J. K. B. 190, C. A.

(*n*) *Tribe* v. *Taylor* (1876), 1 C. P. D. 505 ; *Boyd* v. *Tovil Paper Co.* (1884), 4 T. L. R. 332, C. A. ; *Millar* v. *Radford* (1903), 19 T. L. R. 575, C. A.

(*o*) *Ex p. Durrant, re Beale* (1888), 5 Morr. 37.

(*p*) *Green* v. *Bartlett* (1863), 32 L. J. C. P. 261 ; 14 C. B. (N.S.) 681 ; *Walker* v. *Fraser*, 1910 S. C. 222 ; *Burchell* v. *Gowrie, etc., Collieries*, [1910] A. C. 614 ; 80 L. J. P. C. 41.

intervention. A person called on the agent and obtained an order to view, but thought that the price was too high. The same person subsequently renewed negotiations with a friend of the principal's, and ultimately bought the house. Held, that there was evidence for the jury that the house was sold through the intervention of the agent, so as to entitle him to his commission (*q*).

10. A brewery company agreed to pay an agent commission on all licensed property it might purchase through his introduction. The company promoted a new company, which acquired property introduced to the old company's notice by the agent. Held, that the new company being merely ancillary to the old, the agent was entitled to commission on the properties purchased (*r*).

11. An agent introduced a person to his principal as a possible purchaser of certain property, but no terms were arrived at. The principal subsequently sold the property by auction, the person introduced by the agent being the purchaser. Held, that the agent was not entitled to commission (*s*).

12. A agreed to pay B a commission of £5,000 in the event of B introducing a purchaser of A's business. B failed to find a purchaser, but introduced C, an accountant, as a person who might be able to introduce a purchaser. C eventually himself bought the property at the proposed price after deducting the commission which he was to have been paid in the event of his finding a purchaser. Held, that there was no evidence that B had introduced a purchaser of the business, he having introduced C, not as a purchaser, but as an agent to find a purchaser, and that B could not recover either the agreed commission or a *quantum meruit*, the claim for a *quantum meruit* being excluded by the express contract (*t*).

13. A employed B to sell an estate in lots. C bought certain lots, and B received commission thereon. A then withdrew B's authority, and C subsequently bought the remaining lots by private contract. Held, that the jury were entitled to find that the ultimate sale was not due to B's introduction (*u*).

14. An agent claims commission for procuring a loan. It is not sufficient to show that the loan indirectly resulted from his intervention. He must show that it was obtained by means of the agency, from the parties to whom he applied. If third persons casually heard that a loan was wanted, and lent the money directly to the principal, the agent cannot claim commission thereon (*a*). Similarly, where an agent is employed to find a tenant (*b*).

15. An agent is employed to make inquiries concerning a particular business with a view to the purchase of it by his principal and upon the terms that the principal will pay a commission upon the purchase-price if the purchase should be transacted. If the principal and vendor are brought together by the agent, the commission is earned, although the purchase is ultimately effected through

(*q*) *Mansell* v. *Clements* (1874), L. R. 9 C. P. 139. See also *Barnett* v. *Brown* (1890), 6 T. L. R. 463 ; *Steere* v. *Smith* (1886), 2 T. L. R. 231 ; *Bayley* v. *Chadwick* (1878), 39 L. T. 429, H. L. ; *Burton* v. *Hughes* (1885), 1 T. L. R. 207 ; *Thompson* v. *Thomas* (1896), 11 T. L. R. 304, C. A. Comp. *Brandon* v. *Hanna*, [1907] 2 Ir. R. 212, C. A.

(*r*) *Gunn* v. *Showell's Brewery Co.* (1902), 50 W. R. 659, C. A.

(*s*) *Taplin* v. *Barrett* (1889), 6 T. L. R. 30.

(*t*) *Barnett* v. *Isaacson* (1888), 4 T. L. R. 645, C. A.

(*u*) *Lumley* v. *Nicholson* (1886), 34 W. R. 716

(*a*) *Antrobus* v. *Wickens* (1865), 4 F. & F. 291.

(*b*) *Coles* v. *Enoch*, [1939] 3 All E. R. 327, C. A.

the intervention of another agent, provided that the agent's services are really instrumental in bringing about the transaction (*c*).

16. An agent is employed to sell goods on commission, and the principals agree " to allow him commission upon all orders executed by them and paid for by the customers arising from his introduction". He is entitled to commission on all orders executed for customers introduced by him, including orders received after his dismissal from the principals' employment (*d*). So, where the agreement was to pay commission on all accounts introduced by the agent, so long as the principals continued to do business with the persons he placed on their books, it was held that the commission continued to be payable to the agent's executors after his death (*e*). Where commission was to be paid " on all orders, whether received direct or indirect, and on all repeats", it was held that commission was only to be paid on orders received during the period of the contract (*f*).

## Article 65

REMUNERATION WHERE THE PRINCIPAL ACQUIRES NO BENEFIT

Subject to any express agreement or special custom (*g*), where the remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the principal acquire no benefit from his services, or the transaction in respect of which the remuneration is claimed fall through, provided that it does not fall through in consequence of any act or default of the agent (*h*).

The decisions in most cases illustrating this principal revolve round the interpretation placed upon the words used in the contract of employment of estate agents. The question usually to be decided is whether the agent earns commission on the mere introduction of a prospective purchaser, or whether he acquires a right to commission at a later time, and, if so, at what time. In the words of Lord Russell (*i*) : " It is possible that an owner may be willing to bind himself to pay commission for the mere introduction of one who offers to purchase at the specified or minimum price, but such a

(*c*) *Bow's Emporium* v. *Brett* (1927), 44 T. L. R. 194, H. L. (E.).

(*d*) *Bilbee* v. *Hasse* (1889), 5 T. L. R. 677 ; *Salomon* v. *Brownfield* (1896), 12 T. L. R. 239 ; *Robey* v. *Arnold* (1897), 14 T. L. R. 39.

(*e*) *Wilson* v. *Harper*, [1908] 2 Ch. 370 ; 77 L. J. Ch. 607 ; *Levy* v. *Goldhill*, [1917] 2 Ch. 297 ; 86 L. J. Ch. 693 ; cp. *Cramb* v. *Goodwin* (1919), 35 T. L. R. 477, C. A.

(*f*) *Crocker Horlock* v. *Long*, [1949] 1 All E. R. 526. See also *British Bank for Foreign Trade* v. *Novimex*, [1949] 1 K. B. 623 ; *Nayler* v. *Yearsley* (1860), 2 F. & F. 41 ; *Weare* v. *Brimsdown Lead Co.* (1910), 103 L. T. 429 ; *Sales* v. *Crispi* (1913), 29 T. L. R. 491 ; *Marshall* v. *Glanvill*, [1917] 2 K. B. 87 ; 86 L. J. K. B. 767.

(*g*) Illustration 5.

(*h*) Illustrations 1 to 6. *Webb* v. *Rhodes* (1837), 3 Bing. N. C. 732 ; 43 R. R. 790 ; *Moir* v. *Marten* (1891), 7 L. T. R. 330, C. A. ; *Nosotti* v. *Auerbach* (1898), 79 L. T. 413. A *del credere* commission is due and payable immediately the contract in respect of which it is claimed is made. *Solly* v. *Weiss* (1818), 2 Moo. 420, Ex. Ch. ; *Caruthers* v. *Graham* (1811), 14 East 578. See also §§ 446, 447 of the American Restatement.

(*i*) *Luxor (Eastbourne)* v. *Cooper*, [1941] A. C. 108.

construction of the contract would . . . require clear and unequivocal language". The words " in the event of business resulting " are not clear and unequivocal (*k*).

If the words " if the business is sold " or " on a sale being effected " are used, it has been held that the agent must find a purchaser who is ready, willing and able to complete before he is entitled to commission (*l*). A " purchaser " is a person not only willing but also able to complete (*m*), that is, he must be able to find the necessary money though he need not have it in hand (*n*), so that if the agent is to introduce " a purchaser " (*o*), " find a purchaser " (*p*), or " find someone to buy " (*q*), he must introduce a person who is bound in law to complete the purchase. It is clear that a person who makes an offer " subject to contract " has not entered into a binding agreement, for his offer must be one which by acceptance can become binding (*r*); such an offer is not a " firm offer " (*s*). Similarly, an offer " subject to satisfactory survey " is conditional and not binding (*t*).

A form of words which has been frequently used by estate agents is " upon introducing a person ready, willing and able to purchase", and various interpretations have been placed upon this and like terms as to when the agent's right to commission accrues. In *Reed* v. *Nicholls* (*u*), the agents introduced a person who made " a firm offer to purchase", as they were required to do, which was accepted subject to contract, the vendor refused to complete. The agent was held entitled to commission. In *Bennett* v. *Millett* (*a*), the agent introduced a person who made an offer and paid a deposit, but before completion the vendor withdrew, the agent was held entitled to commission in that he had " introduced a purchaser able and willing to complete", although the person introduced did not in fact complete the qualification of the word " purchaser " was enough to give the agent the right to commission at a stage earlier than completion. The decisions in these three cases were followed in *Nelson* v. *Rolfe* (*b*), in which no offer was made by the person introduced, but it was found that he was a person " able, ready and willing to purchase". In all of these cases the vendor withdrew and the agent was entitled to commission even though in two cases the negotiations were still subject to contract. In *Graham and Scott* (*Southgate*) v. *Oxlade* (*c*), the offer made by the person introduced was conditional, being " subject to contract and satisfactory survey " she was not therefore willing, and the agent had not earned his commission.

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(*k*) *Murdoch Lownie* v. *Newman*, [1949] 2 All E. R. 783 ; not following *Dudley Bros.* v. *Barnet* 1937, S. C. 632.

(*l*) *Martin* v. *Perry*, [1931] 2 K. B. 310 ; 100 L. J. K. B. 582 ; *James* v. *Smith* (1921), [1931] 2 K. B. 317, n. ; 100 L. J. K. B. 585, n., C. A. ; *Chapman* v. *Winson* (1904), 91 L. T. 17, C. A.

(*m*) *Poole* v. *Clarke & Co.*, [1945] 2 All E. R. 445.

(*n*) *James* v. *Smith*, *supra*.

(*o*) *Jones* v. *Lowe*, [1945] 1 K. B. 73.

(*p*) *Fowler* v. *Bratt*, [1950] 2 K. B. 96, C. A.

(*q*) *McCallum* v. *Hicks*, [1950] 1 All E. R. 864, C. A. See also *Luxor* (*Eastbourne*) v. *Cooper*, *supra*.

(*r*) *Keppel* v. *Wheeler*, [1927] 1 K. B. 577, C. A.

(*s*) Illustration 3.

(*t*) *Graham and Scott* (*Southgate*) v. *Oxlade*, [1950] 1 All E. R. 856, C. A.

(*u*) [1948] 2 All E. R. 914.

(*a*) [1949] 1 K. B. 362.

(*b*) [1949] 2 All E. R. 584, C. A.

(*c*) [1950] 1 All E. R. 856, C. A., overruling *Giddys* v. *Horsfall*, [1947] 1 All E. R. 460.

In *Reed* v. *Goody* (*d*) the person introduced by the agent withdrew before the time to complete arrived, thus showing that at that time he did not continue to be willing. Bucknill, L.J., considered that if the vendor had withdrawn whilst the purchaser remained willing, the agents would have been entitled to commission. And Denning, L.J., thought that the purchaser must be willing up to the time for completion, unless he has been previously absolved by the vendor's withdrawal from the contract.

The position in cases where the agent is to introduce a person ready, able and willing to purchase would appear to be that if an offer is made " subject to contract " either party is entitled to withdraw before completion, but if a genuine offer is made, the offeror's willingness to complete must be shown until the time of completion or until such time as the vendor withdraws from the transaction. It seems likely that the Court will be unwilling to construe the contract in favour of the estate agent unless he procures a binding contract of sale, this appears to be " the common understanding of men in these matters".

*Solicitors' Costs of conducting Suit, when payable*

An undertaking by a solicitor to conduct a suit constitutes an entire contract, and he cannot maintain an action for the costs, nor does the Statute of Limitations commence to run against him, until the termination of the suit (*e*), except where he is discharged, or his retainer is repudiated, by the client (*f*); or where the client refuses to put him in funds for out-of-pocket expenses (*g*). But the principle of entire contract does not apply to such a matter as a bankruptcy or winding-up, or an administration (*h*), nor where the solicitor is retained to prosecute various proceedings (*i*).

*Illustrations*

1. A employed B to procure a loan, and entered into the following agreement : " In the event of your obtaining me the sum of £2,000, or such other sum as I shall accept, I agree to pay you a commission of 2½ per cent. on the amount received". B introduced A to a building society, who offered to lend £1,625 upon terms which were accepted by A. The transaction afterwards went off because A would not satisfy certain requirements of the society and failed to show a sufficient title to the property upon which the loan was to have been made. Held, that B was entitled to his commission of 2½ per cent. upon £1,625, the amount the society offered to advance (*k*).

2. An agent who was employed to borrow a certain sum upon leasehold security found a person able and willing to lend that sum, but the transaction

(*d*) [1950] 1 All E. R. 919, C. A. See also discussions on this subject in 94 S. J., p. 293, 100 L. J., pp. 284, 381, 396 and 14 The Conveyancer 274.

(*e*) *Whitehead* v. *Lord* (1852), 7 Ex. 691 ; 21 L. J. Ex. 239 ; *Harris* v. *Quine* (1869), L. R. 4 Q. B. 653 ; 38 L. J. Q. B. 331 ; *Underwood* v. *Lewis*, [1894] 2 Q. B. 306 ; 64 L. J. Q. B. 60, C. A.

(*f*) *Hawkes* v. *Cottrell* (1858), 27 L. J. Ex. 369 ; 3 H. & N. 243.

(*g*) *Wadsworth* v. *Marshall* (1832), 2 Cr. & J. 665 ; 1 L. J. Ex. 250 ; *Whitehead* v. *Lord*, *supra*.

(*h*) *Re Hall and Barker* (1878), 9 Ch. D. 538 ; 47 L. J. Ch. 621.

(*i*) *Warmingtons* v. *McMurray* (1937), 81 S. J. 178, C. A.

(*k*) *Fisher* v. *Drewett* (1879), 48 L. J. Ex. 32, C. A. Comp. *Salter's claim* (1891), 7 T. L. R. 602 ; *Peacock* v. *Freeman* (1888), 4 T. L. R. 541, C. A.

fell through in consequence of unusual covenants of which the agent had no knowledge. Held, that he was entitled to the whole of the agreed commission for procuring the loan (*l*). If an agent, employed to negotiate a loan, brings the principals together, and nothing more remains for him to do, he is entitled to his commission, even if the contract afterwards goes off without any default by his principal (*m*).

3. Where an agent introduced a person who made an offer which was accepted subject to a deposit being paid within a certain time, and the deposit was not paid within the time, it was held that no commission was due (*n*). Where an agent was instructed to "secure an offer" it meant "a firm offer" and that an offer subject to contract was not a firm offer (*o*).

4. It was agreed that an agent should receive commission upon "all goods bought through him". He obtained an order for goods, which the principal accepted, but was unable to execute, so that no benefit resulted therefrom. Held, that the agent was entitled to commission upon the order (*p*).

5. A promised to pay B £5 if he should succeed in obtaining a purchaser for a lease at a certain price. B introduced C, who entered into a contract with A, and paid a deposit. C was unable to complete the purchase, and A permitted the contract to be cancelled, A retaining the deposit. Held, that B had substantially performed his undertaking, and was entitled to payment of the £5 promised (*q*). So, where property was sold at an auction to a purchaser who signed a contract and paid a deposit, but the contract was afterwards rescinded by the vendor in consequence of a requisition by the purchaser with which the vendor could not comply (*r*). But the agent has no right to commission in such a case, unless the contract made is complete and binding (*s*).

6. An agent was employed on commission to purchase certain property. He purchased the property, subject to his principal's solicitor's approval of the title. The principal broke off the transaction, and the title was never submitted to his solicitor. Held, that in order to maintain an action for the commission, the agent ought to show either that the principal's solicitor approved the title, or that such a title was submitted to him as he could not reasonably disapprove, and that unless the agent could prove that the seller had a good title, he could not recover the commission (*t*).

7. A promised to pay B $2\frac{1}{2}$ per cent. commission in the event of his finding a purchaser of certain land at the price of £3,000. B introduced C, who took a lease for 1,000 years at a yearly rent of £150, with an option to purchase

(*l*) *Green* v. *Lucas* (1876), 33 L. T. 584 ; 31 L. T. 731, C. A.
(*m*) *Fuller* v. *Eames* (1892), 8 T. L. R. 278. See judgment of Bramwell, L.J., in *Fisher* v. *Drewett, supra* ; *Passingham* v. *King* (1898), 14 T. L. R. 392, C. A.
(*n*) *Musson* v. *Moxley*, [1936] 1 All E. R. 64.
(*o*) *Bennett, Walden & Co.* v. *Wood*, [1950] 2 All E. R. 134, C. A.
(*p*) *Lockwood* v. *Levick* (1860), 29 L. J. C. P. 340 ; 8 C. B. (N.S.) 603 ; *Hill* v. *Kitching* (1846), 15 L. J. C. P. 251 ; 3 C. B. 299 ; *Harris* v. *Petherick* (1878), 39 L. T. 543 ; *Vulcan Car Agency* v. *Fiat Motors* (1915), 32 T. L. R. 73.
(*q*) *Horford* v. *Wilson* (1807), 1 Taunt. 12 ; *Lara* v. *Hill* (1863), 15 C. B. (N.S.) 45 ; *Platt* v. *Depree* (1893), 9 T. L. R. 194 ; *Passingham* v. *King* (1898), 14 T. L. R. 392, C. A.
(*r*) *Skinner* v. *Andrews* (1910), 26 T. L. R. 340, C. A.
(*s*) *Grogan* v. *Smith* (1890), 7 T. L. R. 132, C. A.
(*t*) *Clack* v. *Wood* (1882), 9 Q. B. D. 276, C. A.

the land, within twenty years, for £3,000. Held, that B had practically found a purchaser, and was therefore entitled to the commission (*u*).

8. An agent was employed to sell an advowson, and it was expressly agreed that the commission should be paid when the abstract of conveyance was drawn out. He found a purchaser, who entered into a contract, but the abstract was not delivered, and negotiations were dropped. Held, that the agent was not entitled to recover the commission, the event upon which it was to become payable not having happened (*a*). So, where it was agreed that commission should be paid "upon the sum which might be obtained", it was held that it could not be recovered until the principal had actually received the amount (*b*). So, if there be a trade custom whereby the agent is not entitled to commission unless the transaction in respect of which it is claimed be completed, he cannot recover the commission until completion, even if the transaction fall through in consequence of the principal's default (*c*).

9. An agreement between estate agents to share the commission if one introduces a willing buyer of the property on the other's books, means: "If I earn my commission through you I will share with you what I so earn" (*d*).

## Article 66

### DAMAGES FOR WRONGFULLY PREVENTING AGENT FROM EARNING REMUNERATION

Where a principal, in breach of an express or implied contract with his agent (*e*), refuses to complete a transaction, or otherwise prevents the agent from earning his remuneration, the agent is entitled to recover, by way of damages, the loss actually sustained by him as a natural and probable consequence of such breach of contract (*f*). The measure of damages, where nothing further remains to be done by the agent, is the full amount that he would have earned if the principal had duly completed the transaction, or otherwise carried out his contract with the agent (*g*).

Where the authority of an agent is revoked by the principal, or the agency is otherwise determined, after it has been partially

(*u*) *Rimmer* v. *Knowles* (1874), 30 L. T. 496; but see *Mote* v. *Gould* (1935), 152 L. T. 347, p. 125, *ante*.

(*a*) *Alder* v. *Boyle* (1847), 16 L. J. C. P. 232; 4 C. B. 635; *Lott* v. *Outhwaite* (1893), 10 T. L. R. 76, C. A.; *Chapman* v. *Winson* (1904), 91 L. T. 17, C. A.; *Henry* v. *Gregory* (1905), 22 T. L. R. 53.

(*b*) *Bull* v. *Price* (1831), 5 M. & P. 2; *Beningfield* v. *Kynaston* (1887), 3 T. L. R. 279, C. A.; *Martin* v. *Tucker* (1885), 1 T. L. R. 655; *Didcott* v. *Friesner* (1896), 11 T. L. R. 187, C. A.; *White* v. *Turnbull* (1898), 78 L. T. 726, C. A.; *Beale* v. *Bond* (1901), 84 L. T. 313, C. A.; *Foster's Agency* v. *Romaine* (1916), 32 T. L. R. 545, C. A.; *Knight* v. *Gordon* (1923), 39 T. L. R. 399; *French* v. *Leeston Shipping Co.*, [1922] 1 A. C. 451; 92 L. J. K. B. 537, H. L.; *Price* v. *Smith* (1929), 141 L. T. 490, C. A.

(*c*) *Read* v. *Rann* (1830), 10 B. & C. 438; 8 L. J. (o.s.) K. B. 144; *Broad* v. *Thomas* (1830), 7 Bing. 99. See Article 63, Illustration 6.

(*d*) *Davis* v. *Trollope*, [1943] 1 All E. R. 501, C. A.

(*e*) Illustrations 1, 7 and 8.

(*f*) Illustrations 1 to 11. *Vickers* v. *Church Extension Association* (1888), 4 T. L. R. 674.

(*g*) *Roberts* v. *Barnard* (1884), 1 C. & E. 336; *Harris* v. *Petherick* (1878) 39 L. T. 543. Comp. *Peacock* v. *Freeman* (1888), 4 T. L. R. 541, C. A.

executed, or after the agent has endeavoured to execute it, the question whether the agent is entitled to any, and if so, to what remuneration for the work previously done, depends upon the nature and terms of his employment, and the custom or usage of the particular business in which he is employed (*h*).

The question of whether a term would be implied in a contract with an estate agent that the principal would do nothing to prevent the agent from earning his commission was very fully considered in *Luxor (Eastbourne)* v. *Cooper* (*i*). After dealing with the previous authorities, Viscount Simon, L.C., put forward three propositions : (1) If the agent is promised commission if he succeeds in introducing to his principal a person who makes an offer of not less than the stipulated amount, then he is entitled to his reward as soon as he introduces such a person whether the offer is accepted and the bargain carried through or not, no implied term is necessary. But Lord Russell said (*k*) that if this is the intention of the parties, the language used must be clear and unequivocal. (2) If the principal puts property into the hands of the agent to dispose of for him, and the agent accepts the employment, and, it may be, expends money and time in endeavouring to carry it out, then there may well be implied a term that the principal will not withdraw the authority he has given after the agent has incurred substantial outlay, or, at any rate, after he has succeeded in finding a possible purchaser. (3) If the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about, there is no room for the implied term. This case has been frequently considered, and it would appear from some cases that its principles have not always been followed (*l*).

### " *Sole Agents* "

The rights of an agent appointed sole agent depend upon the interpretation of the contract as a whole. Where a principal appoints estate agents " sole agents for the sale of property", there is no implied term that the principal will not himself sell ; such a term is not necessary to give business efficacy to the transaction (*m*). In such a case the agents are not entitled to commission on damages, but they will be if another agent effects a sale and the damages must be estimated with reference to the probability that the sole agent would have earned his commission (*n*). The consideration moving from the sole agent is his promise to use his best endeavours to dispose of the property (*o*). If principals appoint an agent sole agent for the sale of their goods in a certain district they may only sell in that district through the agent (*p*). But the facts

(*h*) *Queen of Spain* v. *Parr* (1869), 39 L. J. Ch. 73 ; *Simpson* v. *Lamb* (1856), 25 L. J. C. P. 113 ; 17 C. B. 603. Illustration 9. See also §§ 449, 450, 454, 455, 456 of the American Restatement.

(*i*) [1941] A. C. 108, see p. 120.

(*k*) [1941] A. C. at p. 129.

(*l*) See Article 65.

(*m*) *Bentall* v. *Vicary*, [1931] 1 K. B. 253 ; 100 L. J. K. B. 21, approved in *Luxor (Eastbourne)* v. *Cooper*, *supra*.

(*n*) *Hampton & Sons* v. *George*, [1939] 3 All E. R. 627.

(*o*) *Christopher & Co.* v. *Essig*, [1948] W. N. 461.

(*p*) *Snelgrove* v. *Ellingham Colliery Co.* (1881), 45 J. P. 408.

may show that sole selling agents are not in fact agents, but buyers with the sole right to sell the goods of a manufacturer (*q*).

*Illustrations*

1. A agreed with B that, in consideration of B introducing a purchaser of certain property, A would pay to B a commission—the payment to be made on the completion of the purchase. B introduced C, who offered, "subject to contract", to purchase at the price and upon the terms required by A, who accepted the offer, "subject to contract". C was able and willing to enter into a binding contract and complete the purchase. A refused to enter into a binding contract with C, and disposed of the property otherwise. Held, that no stipulation could be implied in the agreement between A and B that A would sell or agree to sell the property to the person introduced by B, and that A was not liable in damages to B for having prevented him from earning his commission (*r*).

2. A contracted to employ B, and B to serve A, as agent for the sale of such goods as should be forwarded or submitted to B by sample from time to time, the agreement to be determined at the end of five years by notice from either party. Before the expiration of the five years, A's factory was burnt down, and the business was not resumed. Held, that there was no implied condition that the contract should determine on the destruction of the factory, and that B was entitled to substantial damages (*s*).

3. A and B agreed, in consideration of the services and payments to be mutually rendered and made, that for seven years, or so long as A should continue business at L, A should be sole agent there for the sale of B's coals. About four years afterwards B sold his colliery. Held, that B was under no obligation to continue the business, but only to employ A as agent for the sale of such coals as he might send to L, and that the agency necessarily determined when the subject-matter thereof was gone (*t*).

4. Ship brokers procured a time charter, upon the terms that they should be paid a commission on all hire earned under the charterparty. Before the end of the time provided for by the charterparty, the owners sold the vessel to the charterers and agreed to cancel the charterparty. Held, that there

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(*q*) *Lamb* v. *Goring Brick Co.*, [1932] 1 K. B. 710 ; 101 L. J. K. B. 214, C. A.

(*r*) *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper*, [1941] A. C. 108 ; 110 L. J. K. B. 131, H. L. ; *Trollope* v. *Martin*, [1934] 2 K. B. 436 ; 103 L. J. K. B. 634, C. A. ; and *Trollope* v. *Caplan*, [1936] 2 K. B. 382 ; 105 L. J. K. B. 819, C. A., were wrongly decided (*ibid.*), and this seems to apply to *Way & Waller, Ltd.* v. *Verrall*, [1939] 3 All E. R. 533, and to *Harrods, Ltd.* v. *Geneen*, [1938] 4 All E. R. 493; 55 T. L. R. 139, C. A. (where the judgment of MacKinnon, L.J., upon the question of consideration appears preferable to that of the majority). The decision in *Raymond* v. *Wooten* (1931), 47 T. L. R. 606, which was disapproved in *Trollope* v. *Martin*, *supra*, now appears to be correct, see the dissenting judgment of Scrutton, L.J. in the latter case at, [1934] 2 K. B. 444; *Prickett* v. *Badger* (1856), 1 C. B. (N.S.) 296 ; 26 L. J. C. P. 33, was a decision upon its own special facts (see *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper*, *supra*), and should not be treated as laying down any general principle (see per Lord Wright, *ibid.*, at p. 147).

(*s*) *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544 ; 60 L. J. Q. B. 247, C. A. See also *Emmens* v. *Elderton* (1852), 4 H. L. Cas. 624, H. L. ; *Nielans* v. *Cuthbertson* (1891), 7 T. L. R. 516, C. A. ; *Northey* v. *Trevillion* (1902), 7 Com. Cas. 201 ; *Warren* v. *Agdeshman* (1922), 38 T. L. R. 588.

(*t*) *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256 ; 47 L. J. Ex. 396, H. L. ; *Bovine* v. *Dent* (1904), 21 T. L. R. 82 ; *Lazarus* v. *Cairn Line* (1912), 106 L. T. 378. Comp. *Stirling* v. *Maitland* (1864), 34 L. J. Q. B. 1 ; 5 B. & S. 840.

was no implied agreement that the owners would not so sell the vessel and cancel the charterparty, and that the ship brokers were not entitled to commission for any period after the cancellation, or to damages (*u*).

5. Ship brokers negotiated, on behalf of the owners, a charterparty containing an option for the charterers to purchase the ship during the charter period, for £125,000. The owners agreed with the ship brokers that should the option be exercised, the brokerage on the purchase should be $3\frac{1}{2}$ per cent. During the currency of the charter, the owners sold the ship to the charterers for £65,000. Held, that the ship brokers were not entitled to commission, the option to purchase for £125,000 not having been exercised, and the ship brokers' negotiations not being the effective cause of the sale at £65,000 ; and that they could not recover upon a *quantum meruit*, in view of the express agreement (*a*).

6. A firm agreed to employ an agent for a specified term. During the term, one of the partners died. Held, that the parties contracted with reference to the existing partnership, subject to an implied condition that all the parties should so long live, and that, therefore, the agent was not entitled to damages from the other partners for refusing to continue the employment (*b*). Otherwise, if the partnership had been dissolved by agreement (*c*).

7. A company employed a broker to dispose of its shares, and agreed to pay him £100 down, and a further £400 on the allotment of all the shares. The broker disposed of a considerable number of the shares, and then the company was voluntarily wound up. Held, that the broker was prevented from earning the £400 by the act of the company, and was entitled to recover such damages for the breach of contract as the jury thought reasonable. The jury awarded him £250 (*d*).

8. A was engaged for a fixed term by a company as a traveller, and it was agreed that he should receive by way of remuneration a commission upon all orders obtained, but no salary. After A had established a connection, and before the expiration of the term for which he was engaged, the company wound up voluntarily. Held, that A was entitled to recover damages for the loss of the commission that he would have earned during the remainder of the term (*e*). It was pointed out that, had the case been otherwise decided, the company might have immediately commenced business again, and so obtained the benefit of A's connection without paying for it (*e*).

9. An agent was employed by an insurance company for a term of five years, at a fixed salary of £500 a year and a commission on the profits, the

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(*u*) *French* v. *Leeston Shipping Co.*, [1922] 1 A. C. 451 ; 92 L. J. K. B. 537, H. L.; *White* v. *Turnbull* (1898), 78 L. T. 726, C. A.

(*a*) *Howard* v. *Manx Isles Steamship Co.*, [1923] 1 K. B. 110 ; 92 L. J. K. B. 233.

(*b*) *Tasker* v. *Shepherd* (1861), 30 L. J. Ex. 207 ; 6 H. & N. 575. Comp. *Phillips* v. *Hull Alhambra*, [1901] 1 K. B. 59 ; 70 L. J. K. B. 26.

(*c*) *Brace* v. *Calder*, [1895] 2 Q. B. 253 ; 64 L. J. Q. B. 582, C. A. But see *Bovine* v. *Dent* (1904), 21 T. L. R. 82.

(*d*) *Inchbald* v. *Western Neilgherry Coffee, etc., Co.* (1864), 34 L. J. C. P. 15 ; 17 C. B. (N.S.) 733.

(*e*) *Re Patent Floor Cloth Co., Dean and Gilbert's Claim* (1872), 41 L. J. Ch. 476. See also *Re London and Colonial Co., ex p. Clark* (1869), L. R. 7 Eq. 550 ; 38 L. J. Ch. 562 ; *Reigate* v. *Union Manufg. Co.*, [1918] K. B. 592 ; 87 L. J. K. B. 724.

agent undertaking to transact no other business during the term. The company wound up voluntarily before the expiration of the term. Held, that the agent was not entitled to prove in the winding-up for prospective commission, the contract merely importing that a commission on the profits was to be paid if the company found it profitable to carry on the business, and chose to do so. Such a contract gives the agent no right to insist upon the business being carried on (*f*). It will be observed that in this case, a salary was paid, whereas, in Illustration 8, the agent received commission only. But it is not easy to reconcile the decisions, and it would seem that each case must depend upon the presumed intention of the parties to be ascertained from the particular circumstances.

10. The articles of association of a company provided that in the event of the manager being dismissed for any cause other than gross misconduct, he should be paid a certain sum by way of compensation. Held, that he was entitled to prove for such sum in the winding-up of the company (*g*).

11. An agent was employed to sell an advowson. Before he succeeded in finding a purchaser, the principal sold it privately. Held, in an action for wrongful revocation of authority, that the agent was not entitled to recover anything, in the absence of evidence of expense incurred by him (*h*).

## Article 67

### NO REMUNERATION IN RESPECT OF UNLAWFUL OR WAGERING TRANSACTIONS

No agent can recover any remuneration for his services unless at the time when the services were rendered he was legally qualified to act in the capacity in which he claims the remuneration (*i*).

No agent can recover any remuneration in respect of any transaction which is obviously, or to his knowledge, unlawful (*k*), or in respect of any gaming or wagering contract or agreement rendered null and void by the Gaming Act, 1845 (*l*), or of any services in relation thereto or connection therewith (*m*).

The Gaming Act, 1892 (*m*), provides that any promise, express or implied, to pay any sum by way of commission, fee, or reward, or otherwise, in respect of any contract or agreement rendered null and void by the Gaming Act, 1845 (*l*), or of any services in relation thereto or connection therewith, shall be null and void, and no action shall be brought or maintained to recover

(*f*) *Re English and Scottish Marine Insurance Co., ex p. Maclure* (1870), L. R. 5 Ch. 737 ; 39 L. J. Ch. 685, Ch. App. See also *Re Newman, Raphael's Claim*, [1916] 2 Ch. 309 ; 85 L. J. Ch. 625, C. A.

(*g*) *Re London and Scottish Bank, ex p. Logan* (1870), L. R. 9 Eq. 149 ; *Re Imperial Wine Co., Shirreff's Case* (1872), L. R. 14 Eq. 417 ; 42 L. J. Ch. 5. See also *Re Dale and Plant* (1890), 6 T. L. R. 123, as to the right of a managing director to prove in such a case.

(*h*) *Simpson* v. *Lamb* (1856), 17 C. B. 603 ; 25 L. J. C. P. 113 ; 104 R. R. 806 ; *Noah* v. *Owen* (1886), 2 T. L. R. 364, C. A. ; *Brinson* v. *Davies* (1911), 105 L. T. 134.

(*i*) Illustration 1.

(*k*) Illustrations 2 and 3. *Walker* v. *Nightingale* (1726), 4 Bro. P. C. 193.

(*l*) 8 & 9 Vict. c. 109.

(*m*) Gaming Act, 1892 (55 Vict. c. 9).

any such sum. Prior to this Act it was held that a plea of " gaming and wagering " was no answer to an action by a stockbroker for commission upon purchases and sales of stocks or shares, gaming and wagering contracts not being rendered unlawful by the Gaming Act, 1845 (*l*), but merely null and void (*n*).

*Illustrations*

1. A solicitor cannot maintain an action for costs unless his certificate was in force at the time when the work for which the costs are claimed was done (*o*). So, an appraiser cannot maintain any action for remuneration as such, unless he was duly licensed to act in that capacity (*p*).

2. An action was brought for work performed and money expended in buying shares in a company which affected to act as a body corporate without authority by charter or statute, and was, therefore, illegal. Held, that the action was not maintainable, because it arose out of an unlawful transaction (*q*). So, a broker cannot recover commission for effecting a contract of marine insurance which is not contained in a duly stamped policy (*r*), or for effecting any illegal insurance (*s*), or in respect of an illegal sale of offices (*t*). An agreement to pay remuneration in respect of any such unlawful transaction is void (*t*). So, a stockbroker cannot recover commission or brokerage in respect of a purchase or sale of stock or shares, unless he send the principal a duly stamped contract note (*u*).

3. Commission was claimed by a broker for procuring freight. Held, that the fact that the charterparty, in respect of which the commission was claimed, would be illegal unless the charterer obtained certain licences, was no answer to the action, it not being part of the broker's duty to see that the licences were obtained (*a*).

## Article 68

NO REMUNERATION IN CASES OF MISCONDUCT OR BREACH OF DUTY

No agent is entitled to remuneration—

(a) in respect of any unauthorised transaction not ratified by the principal (*b*) ;

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(*n*) *Knight* v. *Fitch* (1855), 24 L. J. C. P. 122 ; 15 C. B. 566. As to what are deemed to be gaming and wagering contracts in stocks or shares, see Article 71, Illustration 7.

(*o*) Solicitors Act, 1932 (22 & 23 Geo. 5, c. 37), s. 50. " Costs " includes fees, charges, disbursements, expenses and remuneration (*ibid.*), s. 81. *Re Brunswick and Crowl* (1849), 4 Ex. 492; 19 L. J. Ex. 112 ; *Re Sweeting*, [1898] 1 Ch. 268 ; 67 L. J. Ch. 159.

(*p*) *Palk* v. *Force* (1848), 12 Q. B. 666 ; 17 L. J. Q. B. 299 ; see also Article 69, Illustration 3.

(*q*) *Josephs* v. *Pebrer* (1825), 3 B. & C. 639.

(*r*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 95, 97.

(*s*) *Allkins* v. *Jupe* (1877), 2 C. P. D. 375 ; 46 L. J. C. P. 824.

(*t*) *Stackpole* v. *Erle* (1761), 2 Wils. 133 ; *Waldo* v. *Martin* (1825), 4 B. & C. 319 ; 28 R. R. 289 ; *Parsons* v. *Thompson* (1790), 1 H. Bl. 322.

(*u*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8, s. 78 (3)). *Learoyd* v. *Bracken*, [1894] 1 Q. B. 114 ; 63 L. J. Q. B. 96, is not now law.

(*a*) *Haines* v. *Busk* (1814), 5 Taunt. 521.

(*b*) Illustrations 1 to 4. *Gillow* v. *Aberdare* (1893), 9 T. L. R. 12, C. A. ; *Keay* v. *Fenwick* (1876), 1 C. P. D. 745, C. A. And see *Beaumont* v. *Boultbee* (1805), 11 Ves. 358. As to ratification, see Article 31, Illustration 12.

(b) in respect of any transaction entered into by him in violation of the duties arising from the fiduciary character of the relationship between him and the principal, even if the transaction be adopted by the principal (*c*) ;

(c) where he has been guilty of wilful breach of duty or misconduct in the course of the agency (*d*) ; or

(d) where the principal derives no benefit from his services, in consequence of his negligence or other breach of duty (*e*).

It should be noted that an agent who through a *bona fide* mistake is guilty of a breach of duty may nevertheless be entitled to remuneration (*f*).

*Illustrations*

1. A is employed on commission to procure a loan upon certain terms. Before anything is done the principal varies the terms. A is unable to procure the loan on the terms as varied, but obtains an offer on the original terms, which the principal refuses to accept. A is not entitled to any commission (*g*).

2. An agent is employed on commission to sell certain property. His authority is revoked by the death of the principal, but he subsequently sells the property, and the principal's executors confirm the sale. The agent is not entitled to recover the agreed commission from the executors unless they ratify and recognise the terms of his employment, but he may be entitled upon a *quantum meruit* (*h*).

3. A solicitor was retained by the managing partner of a firm to recover a partnership debt. Pending the action commenced for that purpose, two dormant partners retired, but no notice of the retirement was given to the solicitor. It was held that, the contract on the retainer being to conduct the action to its termination unless abandoned for good cause, and no notice having been given by the retiring partners not to continue the action on their behalf, they were liable to the solicitor for the costs incurred subsequently to the date of the retirement (*i*).

4. An auctioneer, who is employed to sell property by auction, sells it by private contract. He is not entitled to commission (*k*).

5. An agent, who is employed to sell certain land, sells it to a company in which he is a director and large shareholder. He is not entitled to commission upon the sale, even if it be adopted and confirmed by the principal (*l*).

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(*c*) Illustration 5. *Etna Insurance Co., Re Owens* (1873), 7 Ir. R. Eq. 235, 424 ; *Gray* v. *Haig* (1854), 20 Beav. 219. And see Articles 49 *et seq.*

(*d*) Illustrations 5 to 11. *White* v. *Chapman* (1815), 1 Stark. 113 ; *Hurst* v. *Holding* (1810), 3 Taunt. 32 ; *Palmer* v. *Goodwin* (1862), 13 Ir. Ch. R. 171 ; *Re Hereford Waggon* Co. (1876), 2 Ch. D. 621 ; 45 L. J. Ch. 461, C. A.

(*e*) Illustrations 12 to 14. *Moneypenny* v. *Hartland* (1824), 1 C. & P. 352 ; *Duncan* v. *Blundell* (1820), 3 Stark. 6.

(*f*) See Illustrations 8 to 10.

(*g*) *Toppin* v. *Healey* (1863), 11 W. R. 466.

(*h*) *Campanari* v. *Woodburn* (1854), 24 L. J. C. P. 13 ; 15 C. B. 400.

(*i*) *Court* v. *Berlin*, [1897] 2 Q. B. 396 ; 66 L. J. Q. B. 714, C. A.

(*k*) *Marsh* v. *Jelf* (1862), 3 F. & F. 234.

(*l*) *Salomans* v. *Pender* (1865), 3 H. & C. 639 ; 34 L. J. Ex. 95.

So, if an agent for sale fraudulently take a secret commission from the purchaser, he is not only accountable to the principal for such secret commission, but is not entitled to remuneration from the seller, and if the seller pay him commission in ignorance of the facts, he is entitled to recover it (*m*).

6. A solicitor, having undertaken the conduct of a suit, abandons it without reasonable cause, or without giving his client reasonable notice of his intention to do so. He is not entitled to recover any costs, even for the work already done (*n*). So, a solicitor cannot recover his costs for conducting a suit, unless he has given the client the benefit of his personal judgment and superintendence (*o*). So, where a solicitor and confidential agent neglected to keep regular and proper accounts, he was deprived of his costs and charges (*p*).

7. A shipmaster is guilty of habitual drunkenness, or other wilful misconduct, during his employment. He thereby forfeits his wages (*q*).

8. An auctioneer, employed to sell property on the terms that he should be paid a certain commission and out-of-pocket expenses, received discounts from printers and advertisers, and charged the principal in full without deducting the discounts, in the honest belief that he was entitled to retain them. It was held that, though he must account for the discounts, he was entitled to commission, as he had not acted fraudulently (*r*). So, where a commission agent fraudulently overcharged his principal in respect of some transactions, but acted honestly in other separate and distinct transactions, it was held that he was entitled to commission on the transactions in which he had acted honestly (*s*).

9. An agent, employed to find a purchaser, procured an offer, which the vendor accepted, subject to contract. Subsequently, a higher offer was made by another party to the agent, which in the *bona fide* belief that he had fulfilled his duty, he failed to communicate to the vendor, and the vendor concluded a contract with the person whose offer had been accepted. The vendor recovered as damages from the agent the difference between the price fixed by the concluded contract and the higher offer. Held, that, in the circumstances, the agent was entitled to commission on the price so fixed and the damages (*t*).

10. The estate department of a company acting for the vendor of a house introduced a purchaser, and, in ignorance of the agency, the building department of the company acted for the purchaser and made a report on the house which had the effect of reducing the price. Subsequently the company discovered that they had been acting in this way and made an offer to the vendor to invite the purchaser to obtain an independent report on the house. The

(*m*) *Andrews* v. *Ramsay*, [1903] 2 K. B. 635 ; 72 L. J. K. B. 865. And see *Price* v. *Metropolitan House Investment, etc., Co.* (1907), 23 T. L. R. 630, C. A. ; *Rhodes* v. *Macalister* (1923), 29 Com. Cas. 19, C. A.

(*n*) *Whitehead* v. *Lord* (1852), 7 Ex. 691 ; 21 L. J. Ex. 239 ; *Nicholls* v. *Wilson* (1843), 11 M. & W. 106 ; 12 L. J. Ex. 266 ; *Van Sandau* v. *Browne* (1832), 9 Bing. 402 ; 2 L. J. C. P. 34 ; *Underwood* v. *Lewis*, [1894] 2 Q. B. 306 ; 64 L. J. Q. B. 60, C. A.

(*o*) *Hopkinson* v. *Smith* (1822), 1 Bing. 13.

(*p*) *White* v. *Lincoln* (1803), 8 Ves. 363. Comp. *Re Lee, ex p. Neville* (1868), L. R. 4 Ch. 43.

(*q*) *The Macleod* (1880), 5 P. D. 254 ; *The Dunmore* (1875), 32 L. T. 340 ; *The Roebuck* (1874), 31 L. T. 274 ; *The Atlantic* (1863), 7 L. T. 647.

(*r*) *Hippisley* v. *Knee*, [1905] 1 K. B. 1 ; 74 L. J. K. B. 68.

(*s*) *Nitedals* v. *Taendstikfabrik* v. *Bruster*, [1906] 2 Ch. 671 ; 75 L. J. Ch. 798.

(*t*) *Keppel* v. *Wheeler*, [1927] 1 K. B. 577 ; 96 L. J. K. B. 433, C. A.

vendor refused and completed the sale at a reduction of the agreed price, the reduction being due to the work required to be done as a result of the report. Held, that although the company had committed a breach of their duty as agents, since the principal with full knowledge of this breach had completed the sale at the reduced price, the principal had affirmed the transaction (*u*).

11. An agent was employed by a lessee to find a purchaser of leasehold premises which were subject to a covenant prohibiting the carrying on of any business other than that of a music-seller without the consent of the lessor. Several tailors made offers to the lessee to buy the premises for £2,500, but the lessee believing that the lessor would not consent, did not approach him upon the matter. The agents, having an offer from a tailor of £2,250, and having obtained an assurance from the lessor that he would consent to a tailor's business being carried on upon the premises, concealed from the lessee the fact that the lessor had so assured his consent and the nature of the business of the person making the offer, and induced the lessee to accept £2,250. Held, that the agent was not entitled to any commission (*a*).

12. A broker is employed to negotiate a contract for the hire of a vessel. The contract goes off in consequence of his negligence or default. He is not entitled to recover any remuneration, or even the expenses incurred by him (*b*). If an agent perform his duties so negligently that no benefit results from his services, he is not entitled to any remuneration whatever (*c*).

13. An auctioneer, who was employed to sell an estate, negligently omitted to insert in the conditions of sale a proviso usually inserted therein, and in consequence of the omission the sale was rendered nugatory. Held, that he was not entitled to any compensation or remuneration for his services, although the particulars of the sale had been submitted to the principal, and were not objected to by him (*d*).

14. A solicitor, who was retained to prosecute an appeal, neglected to see that the appeal was duly entered, and failed to give notice thereof, as required by statute. At the subsequent sessions the justices refused to entertain the appeal. Held, that the solicitor was not entitled to recover any costs (*e*). So, if a solicitor, in conducting a suit, commit a negligent act whereby all the previous steps become useless in the result, he cannot recover costs for any part of the work done (*f*) ; and, generally, in the taxation of costs as between solicitor and client, the taxing master ought to disallow any costs occasioned by the negligence or ignorance of the solicitor (*g*).

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(*u*) *Harrods, Ltd.* v. *Lemon*, [1931] 2 K. B. 157 ; 100 L. J. K. B. 219, C. A. See also *Hall & Partners* v. *Wembley Electrical Appliances*, [1947] 2 All E. R. 630, C. A.

(*a*) *Heath* v. *Parkinson* (1926), 136 L. T. 128.

(*b*) *Dalton* v. *Irwin* (1830), 4 C. & P. 289.

(*c*) *Hamond* v. *Holiday* (1824), 1 C. & P. 384 ; *Hill* v. *Featherstonhaugh* (1831), 7 Bing. 569 ; 33 R. R. 576.

(*d*) *Denew* v. *Daverell* (1813), 3 Camp. 451.

(*e*) *Huntley* v. *Bulwer* (1839), 6 Bing. N. C. 111. See also *Long* v. *Orsi* (1856), 26 L. J. C. P. 127 ; 18 C. B. 610.

(*f*) *Bracey* v. *Carter* (1840), 12 Ad. & E. 373 ; *Stokes* v. *Trumper* (1855), 2 Kay & J. 232 ; *Cox* v. *Leach* (1857), 26 L. J. C. P. 125 ; 1 C. B. (N.S.) 617 ; *Shaw* v. *Arden* (1832), 2 L. J. C. P. 1 ; 9 Bing. 287.

(*g*) *Re Massey and Carey* (1884), 26 Ch. D. 459 ; 53 L. J. Ch. 705, C. A. ; *Thwaites* v. *Mackerson* (1828), 3 C. & P. 341 ; *Black* v. *Creighton* (1828), 2 Moll. 552 ; *Re Clarke* (1851), 1 De G. M. & G. 43 ; 21 L. J. Ch. 20 ; *Alsop* v. *Oxford* (1833), 2 L. J. Ch. 174 ; 1 Myl. & K. 564.

SECT. 2.—*Rights of Reimbursement and Indemnity*

## Article 69

INDEMNITY FROM LIABILITIES, AND REIMBURSEMENT OF EXPENSES, INCURRED IN COURSE OF AGENCY

Subject to the provisions of Articles 70 and 71, every agent has a right against his principal, founded upon an implied contract, to be indemnified against all losses and liabilities, and to be reimbursed all expenses, incurred by him in the execution of his authority (*h*) ; and where the agent is sued for money due to his principal, he has a right to set off the amount of any such losses, liabilities, or expenses, unless the money due to the principal is money which was deposited with the agent for a specific purpose which has failed, or is the balance of money, so deposited, which remains after such purpose has been fulfilled (*i*).

An agent who makes advances to his principal has a right of action, as well as a lien, for such advances ; provided that a *del credere* agent cannot sue for advances which are covered by sums due to the principal the payment whereof he has guaranteed (*k*).

The implied contract to indemnify an agent extends to all liabilities incurred by him, not merely to actual losses, and includes those that may not be enforced (*l*), and those incurred under an honest mistake of fact (*m*).

If the particular purpose for which money is deposited with an agent fail, or if a balance remain after such purpose is fulfilled, the agent must return the money or balance to his principal and is not entitled to set off a debt due to him from the principal (*n*).

*Right of set-off by insurance brokers*

Where an insurance broker is sued by the trustee of a bankrupt underwriter for premiums due to the bankrupt, the broker has a right to set off the amount of any losses, or returns of premiums, due from the bankrupt in respect of any policy effected by the broker in his own name on behalf of his principal, provided that the broker, by reason of having acted under a *del credere* commission or otherwise, is personally interested in the payment of such losses or returns of premiums; because such transactions are mutual

(*h*) Illustrations 1 to 10. *Thacker* v. *Hardy* (1878), 4 Q. B. D. 685 ; 48 L. J. Q. B. 289, C. A. ; *Toplis* v. *Grane* (1839), 5 Bing. N. C. 636 ; *Campbell* v. *Larkworthy* (1894), 9 T. L. R. 528, C. A. ; *Pawle* v. *Gunn* (1838), 7 L. J. C. P. 206 ; 4 Bing. N. C. 445 ; *Adams* v. *Morgan*, [1924] 1 K. B. 751 ; 93 L. J. K. B. 382, C. A.

(*i*) Illustrations 9 and 10. *Alsager* v. *Currie* (1844), 13 L. J. Ex. 203 ; 12 M. & W. 751. See also §§ 438 to 440 of the American Restatement.

(*k*) *Graham* v. *Ackroyd* (1852), 22 L. J. Ch. 1046 ; 10 Hare 192.

(*l*) Illustration 4.

(*m*) Illustration 6.

(*n*) *Stumore* v. *Campbell*, [1892] 1 Q. B. 314 ; 61 L. J. Q. B. 463, C. A. ; *Re Mid-Kent Fruit Factory*, [1896] 1 Ch. 567 ; 65 L. J. Ch. 250.

dealings within the meaning of the Bankruptcy Acts (*o*). But he has no right of set-off in respect of any policy effected in the name of the principal (*p*) ; nor in respect of any policy effected in his own name, unless he has a personal interest in the payment of amount claimed to be set off (*q*).

*Illustrations*

1. A employs B to find a purchaser for certain bark. C agrees with B to purchase the bark, subject to its being equal to sample. B, being offered a *del credere* commission by A, accepts A's draft for the price of the bark, and in due course pays the amount of the draft. C then refuses the bark as not being equal to sample. B is entitled to recover from A the amount of the draft paid by him (*r*).

2. A instructs B, a stockbroker, to buy and sell various shares and stock, intending to receive or pay the differences. B is entitled to recover the amount of any losses paid by him at A's request in respect of such shares or stock, although he did not make separate contracts on behalf of A, but appropriated to him portions of larger amounts of shares and stock, which he bought as principal with a view of dividing it amongst various clients for whom he was acting (*s*).

3. A purchased shares as a broker, not being duly licensed as the law then required. Held, that he was entitled to recover from the principal the price of the shares, which he was compelled to pay, such payment not being an essential part of the duty of a broker, although, in consequence of not being licensed, he could not recover any commission or remuneration (*t*).

4. A stockbroker incurs liabilities on the Stock Exchange on behalf of his principal. The stockbroker subsequently pays a composition on the amount of his debts (including such liabilities), and by a rule of the Stock Exchange he cannot be sued for the balance of such debts without the permission of the committee. The principal is bound to indemnify him to the full extent of the liabilities incurred on his behalf (*u*).

5. An auctioneer is instructed to sell certain property, and after he has contracted liabilities in reference to his employment, his authority is revoked by the principal. The principal must indemnify him against the liabilities (*a*).

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(*o*) *Lee* v. *Bullen* (1858), 8 El. & Bl. 692, n. ; *Bize* v. *Dickason* (1786), 1 T. R. 285 ; *Koster* v. *Eason* (1813), 2 M. & S. 112 ; *Parker* v. *Beasley* (1814), 2 M. & S. 423 ; *Davies* v. *Wilkinson* (1828), 4 Bing. 573. Comp. *Elgood* v. *Harris*, [1896] 2 Q. B. 491 ; 66 L. J. Q. B. 53. There is no such right of set-off in an action by the representatives of a deceased underwriter : *Houstoun* v. *Robertson* (1816), 6 Taunt. 448 ; *Houstoun* v. *Bordenave* (1816), 6 Taunt. 451 ; *Beckwith* v. *Bullen* (1858), 8 E. & B. 683 ; 27 L. J. Q. B. 162.

(*p*) *Koster* v. *Eason* (1813), 2 M. & S. 112 ; *Peele* v. *Northcote* (1817), 7 Taunt. 478.

(*q*) *Minett* v. *Forrester* (1811), 4 Taunt. 541 ; *Parker* v. *Smith* (1812), 16 East 382 ; *Goldschmidt* v. *Lyon* (1812), 4 Taunt. 534 ; *Baker* v. *Langhorn* (1816), 6 Taunt. 519.

(*r*) *Hooper* v. *Treffrey* (1847), 1 Ex. 17 ; 16 L. J. Ex. 233 ; Comp. *Simpson* v. *Swan* (1812), 3 Camp. 291.

(*s*) *Ex p. Rogers, re Rogers* (1880), 15 Ch. D. 207, C. A. See also *May* v. *Angeli* (1898), 14 T. L. R. 551, H. L. ; Article 40, Illustration 10. Comp. *Skelton* v. *Wood* (1895), 71 L. T. 616.

(*t*) *Smith* v. *Lindo* (1858), 27 L. J. C. P. 335 ; 5 C. B. (N.S.) 587, Ex. Ch.

(*u*) *Lacey* v. *Hill, Crowley's claim* (1870), L. R. 18 Eq. 182 ; 43 L. J. Ch. 551.

(*a*) *Warlow* v. *Harrison* (1858), 1 El. & El. 295, 309, Ex. Ch. ; *Brittain* v. *Lloyd* (1845), 15 L. J. Ex. 43 ; 14 M. & W. 762.

6. An agent incurs damages and expenses in defending an action on behalf of his principal. He is entitled to reimbursement of such damages and expenses if he was acting within the scope of his authority in defending the action, and the loss was not caused by his own default (*b*). Where an agent, exercising his best judgment, compromised an action brought against him in respect of a contract made on behalf of the principal, who had notice of the action, and had not given any instructions as to the course to be pursued, it was held that the agent was entitled to indemnity, although the plaintiff could not, in the circumstances, have succeeded in the action (*c*).

7. An auctioneer in Paris was instructed by A, in London, to advertise for sale a thoroughbred mare, entered and described in the English Stud Book under the name of Pentecost. The auctioneer advertised accordingly, and a Frenchman, who owned a mare of the same name, sued and recovered damages from him in France, for injury alleged to have been suffered in consequence of A's mare having been advertised by the same name. It was held that A was not liable to indemnify the auctioneer against the loss, because, the description in the advertisement being a true description, the loss could not be said to have been incurred in consequence of any act of the auctioneer in pursuance of his employment, but in consequence of the erroneous decision of the French Court (*d*).

8. An accommodation bill is drawn and accepted for the purpose of raising money for the benefit of the drawer and acceptor. The drawer instructs a bill broker to get the bill discounted. It is the common practice for bill brokers to give a general guarantee to the bankers who discount their bills, and not to indorse each bill discounted on behalf of their customers. The bill is dishonoured, and the broker becomes liable to the bankers upon such a guarantee. The broker is entitled to recover from the acceptor the amount that he is compelled to pay in pursuance of such guarantee, with interest, it being a liability incurred in the execution of his authority in the ordinary course of his business as a bill broker (*e*).

9. A broker, in accordance with a reasonable custom of the particular market in which he was employed, rendered himself personally responsible for the price of goods bought on behalf of his principal, and duly paid for the goods. Held, that he was entitled to set off the amount so paid, in an action by the principal's trustee in bankruptcy for money due to the principal (*f*).

10. An agent, who had general authority to receive and sell goods on behalf of the principal, in good faith brought an action against a third person who wrongfully withheld possession of the goods. In an action by the

(*b*) *Frixione* v. *Tagliaferro* (1855), 10 Moo. P. C. C. 175, P. C. ; *Re Wells* (1895), 72 L. T. 359 ; *The James Seddon* (1866), L. R. 1 Ad. 62 ; 35 L. J. Ad. 117 ; *Williams* v. *Lister* (1913), 109 L. T. 699, C. A. See also *Re Famatina Development Corpn.*, [1914] 2 Ch. 271 ; 84 L. J. Ch. 48, C. A.

(*c*) *Pettman* v. *Keble* (1850), 19 L. J. C. P. 325 ; 9 C. B. 701. See also *Broom* v. *Hall* (1859), 7 C. B. (N.S.) 503.

(*d*) *Halbronn* v. *International Horse Agency*, [1903] 1 K. B. 270 ; 72 L. J. K. B. 90. But *quære* whether this decision is sound. See *Williams* v. *Lister* and *Re Famatina Development Corpn.*, *supra*.

(*e*) *Re Fox, ex p. Bishop* (1880), 15 Ch. D. 400 ; 50 L. J. Ch. 18, C. A.

(*f*) *Cropper* v. *Cook* (1868), L. R. 3 C. P. 194. Comp. *Morris* v. *Cleasby* (1816), 4 M. & S. 566.

principal for the proceeds of the goods it was held that the agent was entitled to set off the amount of the costs incurred by him in the proceedings to recover the goods (*g*).

## Article 70

### LIABILITIES INCURRED UNDER RULES OR USAGES OF PARTICULAR MARKETS

Where an agent is authorised to deal at a particular place, or in a particular market, he is entitled to be indemnified by the principal against all losses and liabilities, and to be reimbursed all expenses, incurred by him in the execution of his authority under the rules or regulations, or according to the customs or usages, of that place or market (*h*). Provided, that no principal incurs any liability in consequence of any unreasonable rule, regulation, custom, or usage, unless he had notice thereof at the time when he conferred the authority on the agent (*i*).

*Illustrations*

1. A authorised B, a broker in Liverpool, to sell certain shares. B sold the shares to C, who was also a broker. A failed to deliver the shares, and B therefore bought some on the market and completed the contract with C. By the usage of Liverpool, of which A had knowledge, it was customary for brokers to render themselves personally liable when contracting with each other. Held, that A was liable to B for the loss incurred by him in completing the contract (*k*).

*Usages of the Stock Exchange*

2. A employs B, a stockbroker, to purchase shares on the Stock Exchange. B purchases the shares, and is compelled to refund to the seller the amount of a "call" which the latter had to pay in order to enable him to transfer the shares. A must indemnify B (*l*).

3. A employs B to sell stock subject to the rules of the Stock Exchange. B sells the stock, and it is transferred to the buyer. It is afterwards discovered that the signature on the transfer is a forgery, and the Committee of the Stock Exchange decide that, according to the rules, B must replace the stock. The rule is a reasonable one, and A must indemnify B, whether he was aware of the rule or not (*m*).

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(*g*) *Curtis* v. *Barclay* (1826), 5 B. & C. 141.

(*h*) Illustrations 1 to 13. *Sentance* v. *Hawley* (1863), 13 C. B. (N.S.) 458 ; *Harker* v. *Edwards* (1887), 57 L. J. Q. B. 147, C. A. ; *Sutton* v. *Tatham* (1839), 10 Ad. & E. 27 ; 8 L. J. Q. B. 210 ; *Stock Advance Co.* v. *Galmoye* (1887), 3 T. L. R. 808, C. A. See also Article 40.

(*i*) Illustrations 11 and 12. *Blackburn* v. *Mason* (1893), 68 L. T. 510, C. A. ; *Robinson* v. *Mollett* (1874), L. R. 7 H. L. 802 ; 44 L. J. C. P. 362. See also Article 38.

(*k*) *Bayliffe* v. *Butterworth* (1847), 1 Ex. 425 ; *Johnston* v. *Usborne* (1841), 11 A. & E. 549. And see *Pollock* v. *Stables* (1848), 12 Q. B. 765 ; 17 L. J. Q. B. 352.

(*l*) *Bayley* v. *Wilkins* (1849), 7 C. B. 886 ; 18 L. J. C. P. 273.

(*m*) *Reynolds* v. *Smith* (1893), 9 T. L. R. 474, H. L. ; affirming *Smith* v. *Reynolds*, 66 L. T. 808, C. A.

4. A employs B, a stockbroker, to purchase, for the next settling day, shares in a bank. Before the settling day the bank stops payment and goes into liquidation. A gives notice to B not to pay for the shares. B nevertheless pays for them, he being bound to do so by the rules of the Stock Exchange. A must indemnify B even if the directors of the bank refuse to consent to a transfer of the shares (*n*).

5. A employs B, a stockbroker, to purchase shares in a company. On settling day A gives B the name of an infant transferee, to whom the shares are transferred. The company is subsequently wound up, and the name of the infant is struck out and that of the transferor substituted as a contributory. The Stock Exchange Committee order B to indemnify the transferor, and B does so. A must indemnify B (*o*).

6. A employs B, a stockbroker, to buy, for next settling day, shares in a company. Before the settling day the company is being wound up under a statute which provides that every transfer of shares after the commencement of the winding-up shall be void unless the Court otherwise orders. B pays for and takes a transfer of the shares on settling day, in accordance with the rules of the Stock Exchange. A must indemnify B (*p*). So, where, in similar circumstances, a broker contracts to sell shares, and by reason of the refusal of the principal to execute a transfer, is compelled to buy other shares at a higher price, in order to carry out the contract, the principal is bound to indemnify the broker against the loss (*q*).

7. A employs B, a stockbroker, to purchase shares. B purchases the shares, but the transfer, in consequence of the winding-up of the company, cannot be registered. B is compelled to indemnify the seller against "calls", according to the rules of the Stock Exchange. A must indemnify B (*r*).

8. A, a stockbroker, upon B's instructions, buys seventy shares for special settlement. Only twenty of the shares are delivered in time according to the rules of the Stock Exchange, and A pays for them. By the usage of the Stock Exchange a buyer is bound to accept and pay for a partial delivery, which is valid *pro tanto*. The usage is reasonable, and B must indemnify A (*s*).

9. A employs B, a stockbroker, to sell bonds. B sells the bonds, and pays the proceeds to A. The bonds are subsequently discovered to be unmarketable, and B, in accordance with the rules of the Stock Exchange, takes them back and repays the price to the purchaser. A must repay the price to B (*t*).

10. By the usage of the Stock Exchange, a broker who contracts, as such, to buy stock is justified in immediately reselling the stock in the event of the death, bankruptcy, or insolvency of the principal. A broker who so

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(*n*) *Taylor* v. *Stray* (1857), 26 L. J. C. P. 287 ; 2 C. B. (N.S.) 175, 197, Ex. Ch. ; *Marten* v. *Gibbon* (1875), 33 L. T. 561, C. A. ; *Hunt* v. *Chamberlain* (1896), 12 T. L. R. 186, C. A. ; *Walter* v. *King* (1897), 13 T. L. R. 270, C. A.

(*o*) *Peppercorne* v. *Clench* (1872), 26 L. T. 656.

(*p*) *Chapman* v. *Shepherd* (1867), L. R. 2 C. P. 228 ; 36 L. J. C. P. 113.

(*q*) *Biederman* v. *Stone* (1867), L. R. 2 C. P. 504 ; 36 L. J. C. P. 198.

(*r*) *Hodgkinson* v. *Kelly* (1868), L. R. 6 Eq. 496 ; 37 L. J. Ch. 837.

(*s*) *Benjamin* v. *Barnett* (1903), 19 T. L. R. 564 ; but see Article 71, Illustration 11.

(*t*) *Young* v. *Cole* (1837), 3 Bing. N. C. 724 ; 6 L. J. C. P. 201. Comp. *Westropp* v. *Solomon* (1849), 19 L. J. C. P. 1 ; 8 C. B. 345.

acts is entitled to recover from the principal or his representatives the amount of any loss incurred on the resale (*u*).

11. A employs B, a stockbroker, to purchase shares in a joint stock banking company. B purchases the shares and sends a contract note to A, in which the numbers of the shares are not inserted as required by Leeman's Act (*a*), the contract, therefore, being void in law. Before the settling day, A repudiates the contract. B nevertheless duly completes the contract, and pays for the shares, to avoid being declared a defaulter and expelled from the Exchange, it being the usual custom for members of the Stock Exchange to ignore Leeman's Act. If A had notice of the custom when he employed B, he must indemnify B (*b*). But if A had no notice of the custom, and was not aware that, by the rules of the Exchange, B was bound to complete such a contract (*c*), or if he knew neither of Leeman's Act nor of the custom (*d*), he is not bound to indemnify B, because the custom is an unreasonable one.

12. A instructs B, his broker, to carry over certain stock to the next settlement, but fails, after receiving due notice of the amount, to pay on the current pay day the balance due for differences, or to place sufficient security at B's disposal. By the usage of the Stock Exchange, a broker may in such a case close the principal's account. B closes A's account, according to usage, and sues him for the losses. The usage is reasonable, and A must indemnify B, whether he had notice of the usage or not (*e*). And the broker is entitled in such a case to close some of the transactions and keep others open, provided that he acts reasonably in the interests of his principal and of himself (*f*). Where a broker informed his principal that he would not be able to carry over shares bought on his account, and the principal said that he could not find the money to take them up, it was held that the broker was justified in carrying over as many of the transactions as he could, and closing the others (*g*).

13. A, a stockbroker, is instructed by B to buy shares. A buys the shares but B fails to carry out the contract, and A has to pay for them. A has a fair price fixed by a jobber, and goes through the form of selling the shares and buying them back again on his own account. The price being fair, and having been fixed at a reasonable time, it is immaterial that A bought the shares back on his own account, and B must indemnify A against the loss (*h*),

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(*u*) *Lacey* v. *Hill, Crowley's claim* (1870), L. R. 18 Eq. 182 ; 43 L. J. Ch. 551 ; *Lacey* v. *Hill, Scrimgeour's claim* (1870), L. R. 8 Ch. 921 ; 42 L. J. Ch. 657, Ch. App. ; *Re Overweg, Haas* v. *Durant*, [1900] 1 Ch. 209 ; 69 L. J. Ch. 255.

(*a*) Banking Companies (Shares) Act, 1867 (30 & 31 Vict. c. 29).

(*b*) *Seymour* v. *Bridge* (1885), 14 Q. B. D. 460 ; 54 L. J. Q. B. 347.

(*c*) *Perry* v. *Barnett* (1885), 15 Q. B. D. 388 ; 54 L. J. Q. B. 466, C. A.

(*d*) *Coates* v. *Pacey* (1892), 8 T. L. R. 474, C. A.

(*e*) *Davis* v. *Howard* (1890), 24 Q. B. D. 691 ; 59 L. J. Q. B. 133 ; *Druce* v. *Levy* (1891), 7 T. L. R. 259.

(*f*) *Morten* v. *Hilton, Gibbes and Smith* (1908), [1937] 2 K. B. 176, n. ; 106 L. J. K. B. 857, n., H. L. ; *Samson* v. *Frazier, Jelke & Co.*, [1937] 2 K. B. 170 ; 106 L. J. K. B. 854. It appears from these cases that *Samuel* v. *Rowe* (1892), 8 T. L. R. 488, is not good law.

(*g*) *Cullum* v. *Hodges* (1901), 18 T. L. R. 6, C. A.

(*h*) *Macoun* v. *Erskine*, [1901] 2 K. B. 493 ; 70 L. J. K. B. 973, C. A. ; *Walter* v. *King* (1897), 13 T. L. R. 270, C. A. ; *Re Finlay*, [1913] 1 Ch. 564 ; 82 L. J. Ch. 295, C. A. ; *Christoforides* v. *Terry*, [1924] A. C. 566 ; 93 L. J. K. B. 481, H. L.

subject to a deduction of any profit A may have made by reason of the sale and re-purchase having been effected in one transaction (*i*).

## Article 71

NO INDEMNITY OR REIMBURSEMENT IN RESPECT OF UNLAWFUL WAGERING, OR UNAUTHORISED TRANSACTIONS, OR OF LIABILITIES OR EXPENSES INCURRED IN CONSEQUENCE OF OWN DEFAULT

No agent is entitled to indemnity against any losses or liabilities, or reimbursement of any expenses incurred by him—

(a) in respect of any act or transaction which is obviously, or to his knowledge, unlawful, except where he is entitled to contribution towards damages for which he is liable in tort (*k*);

(b) in respect of any gaming or wagering contract or agreement rendered null and void by the Gaming Act, 1845 (*l*) ;

(c) in respect of any unauthorised act or transaction not ratified by the principal (*m*) ;

(d) in consequence of his own negligence, default, insolvency, or breach of duty (*n*).

*Contribution between Joint Tortfeasors*

The rule that a tortfeasor could not recover upon either an express or implied promise of indemnity by the person at whose request or on whose behalf the tort was committed (*o*), was confined to cases where the tortious act was obviously unlawful, and did not apply when there was a *bona fide* doubt about the matter (*p*). By the Law Reform (Married Women and Tortfeasors) Act, 1935 (*q*), s. 6, any tortfeasor liable in respect of damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which contribution is sought. The amount of contribution is such as the Court may find just and equitable having regard to the extent of responsibility for the damage ; and the Court has power to

(*i*) *Erskine* v. *Sachs*, [1901] 2 K. B. 504 ; 70 L. J. K. B. 978, C. A.

(*k*) Illustrations 1 to 5.

(*l*) 8 & 9 Vict. c. 109 ; Gaming Act, 1892 (55 Vict. c. 9). Illustrations 6 and 7.

(*m*) Illustrations 8 to 13. *Frixione* v. *Tagliaferro* (1856), 10 Moo. P. C. C. 175, P. C. ; *Coates* v. *Pacey* (1892), 8 T. L. R. 474, C. A. ; *Service* v. *Bain* (1893), 9 T. L. R. 95, C. A. ; *Re Overweg, Haas* v. *Durant*, [1900] 1 Ch. 209 ; 69 L. J. Ch. 255.

(*n*) Illustrations 14 to 17. *Simpson* v. *Swan* (1812), 3 Camp. 291 ; *Frixione* v. *Tagliaferro, supra ; Skyring* v. *Greenwood* (1825), 4 B. & C. 281 ; *Holt* v. *Markham*, [1923] 1 K. B. 504 ; 92 L. J. K. B. 406, C. A. ; *Davison* v. *Fernandes* (1890), 6 T. L. R. 73, *Solloway* v. *McLaughlin*, [1938] A. C. 247 ; 107 L. J. P. C. 1, P. C. See also Article 107.

(*o*) See *Shackell* v. *Rosier* (1836), 5 L. J. C. P. 193 ; 2 Bing. N. C. 634 ; *Scott* v. *Brown*, [1892] 2 Q. B. 724 ; 61 L. J. Q. B. 738, C. A. ; *Smith* v. *Clinton* (1909), 99 L. T. 840.

(*p*) *Betts* v. *Gibbins* (1834), 4 L. J. K. B. 1 ; 2 A. & E. 57 ; *Toplis* v. *Grane* (1839), 5 Bing. N. C. 636 ; *Cory* v. *Lambton* (1917), 86 L. J. K. B. 401, C. A.

(*q*) 25 & 26 Geo. 5, c. 30. See Article 107.

exempt from liability or direct a complete indemnity. The section does not render enforceable any agreement for indemnity which would not have been enforceable if the section had not been passed.

*The Gaming Act*, 1892

The Gaming Act, 1892 (*r*), s. 1, which provides that any contract, express or implied, to pay any person any sum paid (*s*) by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1945 (*t*), shall be null and void, and no action shall be brought or maintained to recover any such sum. Gaming and wagering contracts are not unlawful, but merely void, and prior to the Act of 1892 it was held that money paid by an agent in pursuance of such a contract was recoverable from the principal, even if he had repudiated the transaction before the money was actually paid, the agent being entitled to be indemnified against the moral liability incurred by him in executing his authority (*u*). So, before the Act of 1892, a plea of "gaming and wagering" was no answer to an action by a stockbroker for differences paid on his client's behalf (*a*).

*Completion of Insurance Policies*

In consequence of the Stamp Act, 1891 (*b*), ss. 93, 96 and 97, a contract of marine insurance does not become binding, at law or in equity, until the policy is subscribed by the underwriters (*c*). But a contract of fire insurance is complete and binding immediately the underwriters initial the slip (*d*).

*Illustrations*

1. An agent expends money on behalf of his principal in purchasing shares in a company which affects to act as a body corporate without authority by charter or statute, and which is, therefore, an illegal company. The agent is not entitled to recover from the principal the amount so expended, because the transaction is obviously unlawful (*e*).

2. A broker effects an illegal insurance on behalf of his principal, and pays the premium. He is not entitled to recover from the principal the amount of the premium, or any other payments made by him in respect of such insurance (*f*). Nor is a broker or other agent entitled to reimbursement or indemnity in respect of any contract of marine insurance which is not contained in a duly stamped policy (*g*).

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(*r*) 55 & 56 Vict. c. 9.
(*s*) Includes any sum to be paid : *Levy* v. *Warburton* (1901), 70 L. J. K. B. 708.
(*t*) 8 & 9 Vict. c. 109 ; see s. 18.
(*u*) *Read* v. *Anderson* (1884), 13 Q. B. D. 779 ; 53 L. J. Q. B. 532, C. A. (bets paid by a turf commission agent). The Act is not retrospective : *Knight* v. *Lee*, [1893] 1 Q. B. 41 ; 62 L. J. Q. B. 28.
(*a*) *Rosewarne* v. *Billing* (1863), 33 L. J. C. P. 55 ; 15 C. B. (N.S.) 316 ; *Hannan* v. *Beeton* (1889), 5 T. L. R. 703, C. A.
(*b*) 55 & 56 Vict. c. 39.
(*c*) Illustration 8.
(*d*) *Thompson* v. *Adams* (1889), 23 Q. B. D. 361.
(*e*) *Josephs* v. *Pebrer* (1825), 3 B. & C. 639.
(*f*) *Allkins* v. *Jupe* (1877), 2 C. P. D. 375 ; 46 L. J. C. P. 824 ; *Ex p. Mather* (1797), 3 Ves. 373.
(*g*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 97.

3. An election agent makes payments which are illegal under the Corrupt Practices Acts. He cannot recover the amount of any such payments from the candidate employing him (*h*).

4. A employs B to purchase smuggled goods. B purchases the goods and pays for them. B cannot recover the price from A, even if A obtain possession of the goods (*i*).

5. A instructs B, an auctioneer, to sell goods of which A has no right to dispose, B having no knowledge of any defect in A's title. B sells the goods, and duly pays over the proceeds to A. B is afterwards compelled to pay to the true owner the value of the goods. A must indemnify B, the transaction not being obviously, or to B's knowledge, unlawful (*k*).

6. A makes a bet with B, and loses. C, at A's request and on his behalf, pays B the amount of the bet. C cannot recover the amount from A (*l*).

7. A, intending to speculate, employs a broker to buy and sell stock on the Stock Exchange, the broker being aware that A does not intend to accept the stock bought, or deliver the stock sold, on his behalf, but expects the broker to arrange that only differences shall be paid or received. The broker makes the contracts on A's behalf, and becomes personally liable on them. The broker is entitled to indemnity, because the transactions entered into by him on the Stock Exchange are real contracts for the purchase and sale of stock, and not gaming or wagering contracts (*m*). But if the broker agree with the persons with whom he contracts on behalf of his principal, or if it be the intention of both parties to the contract that no stock or shares shall be bought or sold, but only differences paid or received, it is none the less a wagering contract because there is a provision that either party may at his option require completion (*n*). On the other hand, if either party intend that stock or shares shall be delivered and paid for, the contract is not a wagering contract, even if it provide for the payment of an enhanced price in the event of the stock or shares being taken up (*o*).

8. A authorises B, a broker, to effect a marine insurance policy. After the underwriters have signed the slip, but before a binding contract is made, A revokes B's authority. B, nevertheless, effects the policy, and pays the

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(*h*) *Re Parker* (1882), 21 Ch. D. 408 ; 52 L. J. Ch. 159, C. A.

(*i*) *Ex p. Mather* (1797), 3 Ves. 373.

(*k*) *Adamson* v. *Jarvis* (1827), 4 Bing. 66.

(*l*) *Tatam* v. *Reeve*, [1893] 1 Q. B. 44 ; 62 L. J. Q. B. 30 ; *Gasson* v. *Cole* (1910), 26 T. L. R. 468.

(*m*) *Thacker* v. *Hardy* (1878), 4 Q. B. D. 685 ; 48 L. J. Q. B. 289, C. A. ; *Re Hewett, ex p. Paddon* (1893), 9 T. L. R. 166, C. A. ; *Forget* v. *Ostigny*, [1895] A. C. 318 ; 64 L. J. P. C. 62, P. C. ; *Ex p. Phillips* (1861), 30 L. J. Bky. 1 ; *Ex p. Marnham* (1861), 30 L. J. Bky. 3 ; *Lightbody* v. *Rahbula* (1895), 12 T. L. R. 102 ; *Hirst* v. *Williams* (1895), 12 T. L. R. 128, C. A. ; *Franklin* v. *Dawson* (1913), 29 T. L. R. 479 ; *Barnett* v. *Sanker* (1925), 41 T. L. R. 660 ; *Weddle* v. *Hackett*, [1929] 1 K. B. 321 ; 98 L. J. K. B. 243 ; *Woodward* v. *Wolfe* (1936), 80 S. J. 976. As to the validity of options, see *Buitenlandsche Bankvereeniging* v. *Hildensheim* (1903), 19 T. L. R. 641, C. A. ; *Sadd* v. *Foster* (1897), 13 T. L. R. 207, C. A.

(*n*) *Grizewood* v. *Blane* (1851), 11 C. B. 526, 538 ; *Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166 ; 65 L. J. Q. B. 429, H. L. ; *Re Gieve*, [1899] 1 Q. B. 794 ; 68 L. J. Q. B. 509, C. A. ; *Philip* v. *Bennett* (1901), 18 T. L. R. 129 ; *Wood* v. *Fevez* (1898), 14 T. L. R. 492.

(*o*) *Philip* v. *Bennett* (1901), 18 T. L. R. 129.

premiums. B cannot recover the premiums from A, having acted without authority (*p*).

9. A authorises B and C to insure his life in their names. They insure in the names of B, C and D, and pay the premiums. They are not entitled to recover the amount of the premiums from A, not having strictly pursued their authority (*q*).

10. A, a broker, contracted on behalf of B to sell certain shares to C. In consequence of the non-delivery of the shares, C bought against B, without having tendered a transfer to him, and A paid C the difference although B had given him express notice not to do so. Held that C could not have recovered the difference until a transfer had been tendered by him, and that as A had paid the amount without B's authority, he was not entitled to indemnity from B. Otherwise, if the payment had been made in discharge of a liability incurred by A (*r*).

11. A, a stockbroker, by B's instructions, buys seventy shares for special settlement. Owing to difficulties in connection with the transfer, only twenty of the shares are delivered in time according to the rules of the Stock Exchange. The Committee resolve that A is to pay for the other fifty shares when delivered, and A accordingly takes delivery and pays for them. B is not liable to indemnify A, the shares not having been delivered in accordance with the contract (*s*). The Committee of the Stock Exchange have no power to alter a contract so as to bind non-members (*t*).

12. A, an outside broker, being instructed by B to buy and sell various stocks, without B's consent appropriates to B's account certain stocks held by himself, and from time to time sells and repurchases other stocks bought by him on B's behalf. A is not entitled to recover from B any differences in respect of the stocks so appropriated or dealt with without his consent (*u*). So, where a broker, besides charging commission, added a small percentage to the contract prices, it was held that the principal was entitled to repudiate the transactions, and not merely to an allowance of the overcharges, because the broker had not in fact made the contracts in respect of which indemnity was claimed, but had made other contracts at different prices (*a*).

13. A draws a cheque on his banker. The amount of the cheque is altered without A's authority, and the banker, in good faith, pays the increased amount. The banker is only entitled to charge A with the amount for which the cheque was originally drawn (*b*), unless A is estopped, by his negligence

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(*p*) *Warwick* v. *Slade* (1811), 3 Camp. 127 ; *Fisher* v. *Liverpool Ins. Co.* (1874), L. R. 9 Q. B. 418 ; 43 L. J. Q. B. 114, Ex. Ch. ; *Home Marine Ins. Co.* v. *Smith*, [1898] 2 Q. B. 351 ; 67 L. J. Q. B. 777.

(*q*) *Barron* v. *Fitzgerald* (1840), 6 Bing. N. C. 201 ; *Service* v. *Bain* (1893), 9 T. L. R. 95, C. A.

(*r*) *Bowlby* v. *Bell* (1846), 16 L. J. C. P. 18 ; 3 C. B. 284 ; *Howard* v. *Tucker* (1831), 1 B. & Ad. 712 ; 35 R. R. 418. (*s*) *Benjamin* v. *Barnett* (1903), 19 T. L. R. 564.

(*t*) *Ibid.* ; *Union Corpn.* v. *Charrington* (1902), 8 Com. Cas. 99.

(*u*) *Skelton* v. *Wood* (1895), 71 L. T. 616.

(*a*) *Stange* v. *Lowitz* (1898), 14 T. L. R. 498, C. A. ; *Johnson* v. *Kearley*, [1908] 2 K. B. 514 ; 77 L. J. K. B. 904, C. A. ; *Nicholson* v. *Mansfield* (1901), 17 T. L. R. 259 ; *Thompson* v. *Meade* (1891), 7 T. L. R. 698. Comp. *Stubbs* v. *Slater*, [1910] 1 Ch. 632 ; 79 L. J. Ch. 420, C. A. ; *Henderson* v. *Martin* (1912), 46 Ir. L. T. 13 ; *Aston* v. *Kelsey*, [1913] 3 K. B. 314 ; 82 L. J. K. B. 817, C. A. ; *Blaker* v. *Hawes* (1913), 109 L. T. 320.

(*b*) *Colonial Bank of Australasia* v. *Marshall* (1906), 75 L. J. P. C. 76, P. C. ; *Hall*

or otherwise, from denying the validity of the cheque as altered (*c*). Similarly, where a banker pays a cheque which has been altered as to the name of the payee, he cannot debit his customer with the amount of the cheque (*d*).

14. A solicitor undertook a prosecution for perjury, and agreed that he would only charge out-of-pocket expenses. The prosecution failed in consequence of the negligent way in which the indictment was drawn. Held, that the solicitor was not entitled to recover the disbursements (*e*). So, an agent is not entitled to be indemnified against a loss incurred by him in consequence of his own mistake on a point of law as to which he ought to have been competent (*f*).

15. A stockbroker is instructed by his principal to carry over stock to the next settlement. Before the next settling day the broker becomes insolvent and is declared a defaulter, in consequence of which the stock is sold at a loss. The principal is not bound to indemnify the broker, the loss having been caused by the broker's insolvency (*g*).

16. A stockbroker, having bought stock on his principal's behalf for the following settlement, wrongfully sold it before settling day without the principal's authority. The stock was at a higher price on settling day than when it was sold, but lower than the price at which it was bought. Held, that the broker was not entitled to indemnity, even subject to an allowance for damages for the breach of duty in selling without authority (*h*).

17. A broker is instructed to buy shares, and becomes a defaulter before settling day. He informs his principal that he may have the contract completed (the jobber is bound to complete in such a case if the principal wish), or may consider it closed at the official price at the time of the broker's default. The principal elects the latter alternative. He is bound to indemnify the broker against the loss, having ratified the closing of the transaction before settling day (*i*).

## Sect. 3.—*Lien*

### Article 72

DEFINITIONS OF GENERAL AND PARTICULAR POSSESSORY LIENS

A possessory lien is the right of a person who has possession of goods or chattels belonging to another, to retain possession

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v. *Fuller* (1826), 5 B. & C. 750 ; *Halifax Union* v. *Wheelwright* (1875), L. R. 10 Ex. 183 ; 44 L. J. Ex. 121 ; *British Linen Co.* v. *Caledonian Ins. Co.* (1861), 4 Macq. 107, H. L. ; *Kepitigalla Rubber Estates* v. *National Bank of India*, [1909] 2 K. B. 1010 ; 78 L. J. K. B. 964 ; *Walker* v. *Manchester, etc., Banking Co.* (1913), 108 L. T. 728. As to countermanding payment of a cheque by telegram, see *Curtice* v. *London, etc., Bank*, [1908] 1 K. B. 293 ; 77 L. J. K. B. 341, C. A.

(*c*) *London Joint Stock Bank* v. *Macmillan*, [1918] A. C. 777, H. L. ; *Young* v. *Grote* (1827), 5 L. J. (o.s.) C. P. 165.

(*d*) *Slingsby* v. *District Bank*, [1932] 1 K. B. 544 ; 101 L. J. K. B. 281.

(*e*) *Lewis* v. *Samuel* (1846), 8 Q. B. 685 ; 15 L. J. Q. B. 218. See also *Thomas* v. *Atherton* (1878), 10 Ch. D. 185 ; 48 L. J. Ch. 370, C. A.

(*f*) *Capp* v. *Topham* (1805), 6 East 392.

(*g*) *Duncan* v. *Hill, Duncan* v. *Beeson* (1873), L. R. 8 Ex. 242 ; 42 L. J. Ex. 179, Ex. Ch. ; *Allen* v. *Wingrove* (1901), 17 T. L. R. 261, C. A.

(*h*) *Ellis* v. *Pond*, [1898] 1 Q. B. 426 ; 67 L. J. Q. B. 345, C. A.

(*i*) *Hartas* v. *Ribbons* (1889), 22 Q. B. D. 254, C. A.

thereof until the satisfaction of some debt or obligation by the owner of the goods or chattels.

Where the right is to retain possession in respect of a general balance of account, or until the satisfaction of debts or obligations incurred independently of the goods or chattels subject to the right, it is called a general lien.

Where the right is confined to debts and obligations incurred in respect of the goods or chattels subject to the right, it is called a particular lien.

## Article 73

### POSSESSORY LIEN OF AGENTS

Every agent has a general or particular possessory lien on the goods and chattels of his principal in respect of all lawful claims he may have as such agent against the principal, either for remuneration earned, or advances made, or losses or liabilities incurred, in the course of the agency, or otherwise arising in the course of the agency (*k*), provided—

(1) that the possession of the goods or chattels was lawfully obtained by him in the course of the agency (*l*), and in the same capacity as that in which he claims the lien (*m*) ;

(2) that there is no agreement inconsistent with the right of lien (*n*) ; and

(3) that the goods or chattels were not delivered to him with express directions, or for a special purpose, inconsistent with the right of lien (*o*).

The possessory lien of every agent is a particular lien only, except where he has a general lien by agreement, express or implied, with his principal (*p*). Such an agreement may be implied from a course of dealing between the principal and agent, or from an established custom or usage (*p*). Factors (*q*), insurance brokers (*r*),

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(*k*) Illustrations 1 to 9. See § 464 of the American Restatement.

(*l*) Illustrations 7 and 10.

(*m*) Illustrations 9, 11, 16 and 17.

(*n*) Illustrations 12 and 13. *Cowell* v. *Simpson* (1809), 16 Ves. 280 ; 10 R. R. 181 ; *Bock* v. *Gorrissen* (1861), 30 L. J. Ch. 39 ; *Crawshay* v. *Homfray* (1820), 4 B. & A. 50 ; 22 R. R. 618.

(*o*) Illustrations 14 to 17.

(*p*) *Bock* v. *Gorrissen* (1861), 30 L. J. Ch. 39 ; *Rushforth* v. *Hadfield* (1806), 7 East 224 ; *Holderness* v. *Collinson* (1827), 7 B. & C. 212.

(*q*) *Baring* v. *Corrie* (1818), 2 B. & A. 137 ; *Godin* v. *London Assurance Co.* (1758), 1 W. Bl. 103. And see Illustrations 5, 6, 9, 11 and 12.

(*r*) *Snook* v. *Davidson* (1809), 2 Camp. 218 ; *Mann* v. *Forrester* (1814), 4 Camp. 60 ; *Westwood* v. *Bell* (1815), 4 Camp. 349.

stockbrokers (*s*), solicitors (*t*), bankers (*u*), wharfingers (*a*), and packers (*b*), have a general lien by implication from custom.

A lien cannot be acquired by a wrongful act. If an agent obtain goods from his principal by misrepresentations, he has no lien thereon, though the circumstances in other respects be such that he would have had a lien if the goods had been obtained lawfully (*c*).

*Solicitor's General Lien*

Every solicitor has a lien for his general bill of costs upon documents and chattels belonging to his client (*d*) of which he lawfully obtains possession ; and the Court will not interfere with his general lien by ordering him to deliver up papers deposited with him for the purposes of a particular suit, upon payment only of the costs of that suit, even though the possession of the papers be necessary to enable the client to go on with the proceedings (*e*). But, where the client has a pressing necessity for the possession of papers, the Court may order delivery, upon a deposit being made in Court sufficient to cover the amount of the solicitor's general bill of costs remaining unpaid and the costs of taxation (*f*).

The lien is confined to taxable costs, charges and expenses, and does not extend to advances or other claims arising otherwise than in the capacity of solicitor (*g*). Nor does the lien of a solicitor upon deeds handed to and retained by him personally extend to the general bill of costs of his firm (*h*).

Where possession of documents or chattels has been obtained by the solicitor without the authority of his client, the lien does not attach (*i*).

Documents coming into the possession of the solicitor as mortgagee of his client's estate (*k*), or as steward (*l*), or as town clerk (*m*) are not subject to

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(*s*) *Jones* v. *Peppercorne* (1858), 28 L. J. Ch. 158 ; Johns. 430 ; *Re London and Globe Finance Corpn.*, [1902] 2 Ch. 416 ; 71 L. J. Ch. 893 ; *Hope* v. *Glendinning*, [1911] A. C. 419 ; 80 L. J. P. C. 193, H. L.

(*t*) See *post*.

(*u*) *London Chartered Bank* v. *White* (1879), 4 App. Cas. 413 ; 48 L. J. P. C. 75, P. C. ; *Jourdaine* v. *Lefevre* (1793), 1 Esp. 66. Illustrations 11, 12 and 14.

(*a*) *Naylor* v. *Mangles* (1794), 1 Esp. 109 ; *Spears* v. *Hartley* (1798), 3 Esp. 81.

(*b*) *Re Witt, ex p. Shubrook* (1876), 2 Ch. D. 489 ; 45 L. J. Bky. 118, C. A.

(*c*) *Madden* v. *Kempster* (1807), 1 Camp. 12.

(*d*) The lien does not attach to the client's will : *Georges* v. *Georges* (1811), 18 Ves. 294 ; *Balch* v. *Symes* (1823), T. & R. 87 ; but see *Heap* v. *Jackson* (1887), W. N. 192, as to a charging order on the estate. Lien cannot be claimed upon a deed sought to be impeached : *Balch* v. *Symes*, *supra*.

(*e*) *Stevenson* v. *Blakelock* (1813), 1 M. & S. 535 ; *Worrall* v. *Johnson* (1820), 2 J. & W. 214 ; *Friswell* v. *King* (1846), 15 Sim. 191 ; *Re Broomhead* (1847), 5 D. & L. 52 ; 16 L. J. Q. B. 355.

(*f*) *Clutton* v. *Pardon* (1823), T. & R. 301 ; *Richards* v. *Platel* (1841), Cr. & Ph. 79 ; *Re Bevan and Whitting* (1864), 33 Beav. 439 ; *Re Jewitt* (1864), 34 Beav. 22 ; *Re Galland* (1885), 31 C. D. 296.

(*g*) *Re Galland*, *supra* ; *Re Taylor*, [1891] 1 Ch. 590 ; 60 L. J. Ch. 525 ; *Re Walker* (1893), 68 L. T. 517 ; *Re Hanbury* (1897), 75 L. T. 449.

(*h*) *Re Forshaw* (1847), 17 L. J. Ch. 61 ; *Re Gough* (1894), 70 L. T. 725.

(*i*) *Wickens* v. *Townshend* (1830), 1 Russ. & M. 361 ; *Gibson* v. *May* (1853), 1 De G. M. & G. 512 ; *Leete* v. *Leete* (1879), 48 L. J. P. 61 ; *Cross* v. *Cross* (1881), 43 L. T. 533. See also Articles 74 and 75.

(*k*) *Pelly* v. *Wathen* (1849), 7 Hare 351 ; *Sheffield* v. *Eden* (1878), 10 Ch. D. 291, C. A.

(*l*) *Champernown* v. *Scott* (1821), 6 Madd. 93.

(*m*) *R.* v. *Sankey* (1836), 5 A. & E. 423.

the general lien ; nor are documents deposited with him merely for safe custody (*n*), or for a specific purpose inconsistent with the lien (*o*), unless they are allowed to remain in his custody after the special purpose has failed or come to an end (*p*). The general lien will attach, however, to documents deposited for a particular purpose, unless the lien is excluded by express agreement, or is clearly inconsistent with such purpose (*q*).

*Solicitor's Charging Lien*

Any Court in which a solicitor has been employed to prosecute or defend any suit, matter, or proceeding, may at any time declare the solicitor entitled to a charge on the property recovered or preserved (*r*), through his instrumentality for his taxed costs in reference to that suit, matter or proceeding, and may make such orders for the taxation of the said costs and for raising money to pay, and for paying, the said costs out of the said property as they think fit ; and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a *bona fide* purchaser for value without notice (*s*), be void as against the solicitor ; provided that no such order shall be made if the right to recover the costs is barred by any Statute of Limitations (*t*). The right to such a declaration is often referred to as a " charging lien." It will pass to the assignee or legal personal representative of the solicitor (*u*). The order is a matter of judicial discretion (*x*), and must be made in the Court to which the particular suit is attached (*a*). The Act applies only to costs and expenses connected with proceedings in any civil Court (*b*) ; arbitration is a proceeding in Court (*c*). All property recovered or preserved (*d*) in any such proceedings by the instrumentality of a solicitor is subject to his charging lien for the cost of such proceedings, even

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(*n*) *Re Long* (1881), 16 Ch. D. 617.

(*o*) *Re Cullen* (1859), 27 Beav. 51 ; *Re Clark* (1876), 4 Ch. D. 515.

(*p*) *Ex p. Sterling* (1809), 16 Ves. 257 ; *Ex p. Pemberton* (1810), 18 Ves. 282.

(*q*) *Ex p. Sterling, supra* ; *Colmer* v. *Ede* (1870), 40 L. J. Ch. 185.

(*r*) As to the meaning of " property recovered or preserved," see *Rowlands* v. *Williams* (1885), 2 T. L. R. 72, C. A. ; *Scholefield* v. *Lockwood* (1868), L. R. 7 Eq. 83 ; 38 L. J. Ch. 232 ; *Harrison* v. *Harrison* (1888), 13 P. D. 180 ; 58 L. J. P. 28, C. A. ; *Re Pinkerton, Pinkerton* v. *Easton* (1873), L. R. 16 Eq. 490 ; 42 L. J. Ch. 878 ; *Foxon* v. *Gascoigne* (1874), L. R. 9 Ch. 654 ; 43 L. J. Ch. 729 ; *M'Larnon* v. *Carrickfergus U. C.*, [1904] 2 Ir. R. 44 ; *Re Clayton* (1905), 92 L. T. 223 ; *Re Turner, Wood* v. *Turner*, [1907] 2 Ch. 126, 539, C. A. ; *Wingfield* v. *Wingfield*, [1919] 1 Ch. 462 ; 88 L. J. Ch. 229, C. A.

(*s*) See *The Birnam Wood*, [1907] P. 1 ; 76 L. J. P. 1, C. A.

(*t*) Solicitors Act, 1932 (22 & 23 Geo. 5, c. 27), s. 69. As to the Statute of Limitations, see *Ex p. Turner* (1861), 30 L. J. Ch. 29 ; *Baile* v. *Baile* (1871), L. R. 13 Eq. 497 ; 41 L. J. Ch. 300 ; *Smith* v. *Betty*, [1903] 2 K. B. 317 ; 72 L. J. K. B. 853, C. A.

(*u*) *Briscoe* v. *Briscoe*, [1892] 3 Ch. 543 ; 61 L. J. Ch. 665 ; *Baile* v. *Baile, supra.*

(*x*) *Harrison* v. *Harrison* (1888), 13 P. D. 180 ; 58 L. J. P. 28, C. A. ; *Ex p. Harper, re Pooley* (1882), 20 Ch. D. 685 ; 51 L. J. Ch. 810 ; *Re Born, Curnock* v. *Born*, [1900] 2 Ch. 433 ; 69 L. J. Ch. 669 ; *Re Turner, Wood* v. *Turner*, [1907] 2 Ch. 126, 539 ; 76 L. J. Ch. 492, C. A. ; *Re Cockrell's Estate*, [1912] 1 Ch. 23 ; 81 L. J. Ch. 152, C. A.

(*a*) *Re Fiddey* (1871), L. R. 6 Ch. 865 ; *Catlow* v. *Catlow* (1877), 2 C. P. D. 362 ; *Higgs* v. *Schrader* (1878), 3 C. P. D. 252 ; 47 L. J. C. P. 426 ; *Owen* v. *Henshaw* (1877), 7 Ch. D. 385 ; 47 L. J. Ch. 267 ; *Clover* v. *Adams* (1881), 6 Q. B. D. 622 ; *Re Cook, ex p. Cripps*, [1899] 1 Q. B. 863 ; 68 L. J. Q. B. 597 ; *Re Deakin, ex p. Daniell*, [1900] 2 Q. B. 489 ; 69 L. J. Q. B. 725, C. A.

(*b*) *Re Humphreys, ex p. Lloyd-George*, [1898] 1 Q. B. 520 ; 67 L. J. Q. B. 412, C. A.

(*c*) Arbitration Act, 1950 (14 Geo. 6, c. 27), s. 18 (5).

(*d*) *Supra*, note (*r*).

if the verdict and judgment therein be against his client (*e*). Thus, it attaches upon money received by way of compromise (*e*), or awarded to the client upon a reference of the suit to arbitration (*f*).

Money paid into Court by a plaintiff, as security for the defendant's costs, is not, however, on a judgment for the plaintiff, deemed to be property preserved, within the meaning of the Act (*g*). The lien is confined to the costs of the proceedings for recovering or preserving the particular property, and does not extend to the costs of a separate action by the same client (*h*). The charge is in the nature of salvage, and may be made on the interests in the property recovered or preserved of all persons who benefit by the proceedings, though they were not parties thereto, and did not employ the solicitor (*i*).

*Priority of charging lien.*—A solicitor is entitled to a charging order, even if he were discharged before the trial, but subject to the lien for costs of the solicitor for the time being (*k*). Such a charge has priority to a garnishee order in reference to the fund recovered (*l*), and to the claims of all purchasers for value and others who acquire their interests with a knowledge of the proceedings (*m*), and is paramount to a restraint on anticipation attached to the property recovered or preserved of a married woman (*n*). Where a receiver was appointed in an action for dissolution of partnership, it was held that the charging lien of the plaintiff's solicitor had priority to the claim of the creditors of the partnership (*o*).

*Effect of Compromise, etc.*—The charging lien of a solicitor will not be permitted by the Court to be prejudicially affected by a collusive compromise (*p*),

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(*e*) *Davies* v. *Lowndes* (1847), 3 C. B. 823 ; *Ross* v. *Buxton* (1889), 42 Ch. D. 190 ; 58 L. J. Ch. 442 ; *M'Larnon* v. *Carrickfergus U. C.*, [1904] 2 Ir. R. 44.

(*f*) *Ormerod* v. *Tate* (1801), 1 East 464.

(*g*) *Re Wadsworth, Rhodes* v. *Sugden* (1885), 29 Ch. D. 517 ; 54 L. J. Ch. 638 ; *Pierson* v. *Knutsford Estates Co.* (1884), 13 Q. B. D. 666 ; 53 L. J. Q. B. 181, C. A.

(*h*) *Mackenzie* v. *Mackintosh* (1891), 64 L. T. 706, C. A. ; *Smith* v. *Betty*, [1903] 2 K. B. 317 ; 72 L. J. K. B. 853, C. A.

(*i*) *Greer* v. *Young* (1882), 24 Ch. D. 545 ; 52 L. J. Ch. 915, C. A. ; *Scholey* v. *Peck*, [1893] 1 Ch. 709 ; 62 L. J. Ch. 658 ; *Bulley* v. *Bulley* (1878), 8 Ch. D. 479 ; 47 L. J. Ch. 841, C. A. ; *Charlton* v. *Charlton* (1883), 52 L. J. Ch. 971 ; *Emden* v. *Carte* (1881), 19 Ch. D. 311 ; 51 L. J. Ch. 371 ; *Ex p. Tweed*, [1899] 2 Q. B. 167 ; 68 L. J. Q. B. 794, C. A. ; *Re Horne, Horne* v. *Horne*, [1906] 1 Ch. 271 ; 75 L. J. Ch. 206. *Berrie* v. *Howitt* (1869), L. R. 9 Eq. 1, must be considered overruled.

(*k*) *Re Wadsworth, supra ; Re Knight, Knight* v. *Gardner*, [1892] 2 Ch. 368 ; 61 L. J. Ch. 399 ; *Pilcher* v. *Arden* (1877), 7 Ch. D. 318 ; 47 L. J. Ch. 479, C. A.

(*l*) *Ex p. Adams, Dallow* v. *Garrold* (1884), 14 Q. B. D. 543 ; 54 L. J. Q. B. 76, C. A. ; followed in *Re Blake, Clutterbuck* v. *Bradford*, [1945] Ch. 61, C. A. ; [1945] 1 All E. R. 1 ; *Shippey* v. *Gray* (1880), 49 L. J. C. P. 524, C. A. And see *The Heinrich* (1872), L. R. 3 Ad. 505 ; 41 L. J. Ad. 68.

(*m*) *Faithfull* v. *Ewen* (1878), 7 Ch. D. 495 ; 47 L. J. Ch. 457, C. A. ; *Cole* v. *Eley*, [1894] 2 Q. B. 350 ; 63 L. J. Q. B. 682, C. A. ; *Haymes* v. *Cooper* (1864), 33 L. J. Ch. 488 ; *The Paris*, [1896] P. 77 ; 65 L. J. P. 42 ; *Ridd* v. *Thorne*, [1902] 2 Ch. 344 ; 71 L. J. Ch. 624 ; *M'Larnon* v. *Carrickfergus U. C.*, [1904] 2 Ir. R. 44. Comp. *The Birnam Wood*, [1907] P. 1 ; 76 L. J. P. 1, C. A.

(*n*) *Re Keane* (1871), L. R. 12 Eq. 115 ; 40 L. J. Ch. 617. See Married Women (Restraint Upon Anticipation) Act, 1949 (12, 13 & 14 Geo. 6, c. 77), s. 1, abolishing restraint on anticipation.

(*o*) *Jackson* v. *Smith, Ex p. Digby* (1884), 53 L. J. Ch. 972 ; *Re Suffield and Watts* (1888), 20 Q. B. D. 693, C. A. ; *Newport* v. *Pougher*, [1937] Ch. 214 ; 106 L. J. Ch. 166, C. A.

(*p*) *Price* v. *Crouch* (1891), 60 L. J. Q. B. 767 ; *Re Margetson and Jones*, [1897] 2 Ch. 314 ; 66 L. J. Ch. 619.

or by an agreement between the parties (*q*). Thus, where two actions were pending between the same parties, and they agreed to refer both actions to arbitration, the result being that £100 was awarded to one of the parties, and £80 to the other, it was held that the £80 could not be set off against the £100 to the prejudice of a solicitor who claimed a lien for the costs of the action in respect of which the £100 was awarded to his client (*q*). Nor will the costs of the opponent in a separate action be permitted to be set off to the prejudice of the solicitor's lien (*r*). So, on an application to set off cross judgments in distinct actions, the Court has discretion to order that the set-off shall be subject to the lien for costs of the solicitor of the opposite party (*s*). If the defendant in an action pay money to the plaintiff, either by way of compromise, or in pursuance of an award, or otherwise, after receiving notice from the plaintiff's solicitor of his claim to a charging lien thereon, the defendant is personally liable to such solicitor for his taxed costs in the proceedings, to the extent that the amount so paid by him would have satisfied such costs (*t*). But the Court will not interfere with a compromise entered into in good faith and not with the intention of depriving the solicitor of his costs (*u*). Where a verdict for £25 was entered, and a rule *nisi* was obtained to set it aside, it was held that a settlement for £10, made to avoid the expenses of a new trial, the plaintiff being a pauper, was not impeachable by the plaintiff's solicitor on the ground of his lien (*a*). And the lien is subject to the equities between the parties, and only attaches on the general result of the cause. Thus, where there is a counterclaim, or costs are ordered to be paid by the plaintiff in the same cause, the lien attaches only on the balance actually recovered by the plaintiff, after setting off the amount recovered by the defendant on the counterclaim, or the costs so ordered to be paid by the plaintiff (*b*). So, if the defendant be entitled, as against the plaintiff, to be relieved from the verdict, the Court will not abstain from interfering and giving effect to the defendant's rights, merely because the plaintiff's solicitor has a lien on the subject-matter (*c*). And where a defendant against whom a judgment for damages was obtained had an unsatisfied judgment against the plaintiff in a former action, a set-off of the damages was allowed, notwithstanding that the plaintiff's solicitor had *ex parte* obtained a charging order for his costs (*d*).

*Town agents.*—A London agent is not entitled, as against the client, to a charging order under the Act, because he is not the solicitor employed by

(*q*) *Cowell* v. *Betteley* (1834), 10 Bing. 432.

(*r*) *Blakey* v. *Latham* (1889), 41 Ch. D. 518 ; *Hassell* v. *Stanley*, [1896] 1 Ch. 607 ; 65 L. J. Ch. 494 ; *Bake* v. *French*, [1907] 1 Ch. 428 ; 76 L. J. Ch. 299. But see *Puddephatt* v. *Leith*, [1916] 2 Ch. 168 ; 85 L. J. Ch. 543.

(*s*) *Edwards* v. *Hope* (1885), 14 Q. B. D. 922 ; 54 L. J. Q. B. 379.

(*t*) *Ross* v. *Buxton* (1889), 42 Ch. D. 190 ; 58 L. J. Ch. 442 ; *Ormerod* v. *Tate* (1801), 1 East 464 ; 6 R. R. 327 ; *Read* v. *Dupper* (1795), 6 T. R. 361. And see *The Leader* (1868), L. R. 2 Ad. 314.

(*u*) *The Hope* (1883), 8 P. D. 144 ; 52 L. J. P. 63, C. A. ; *Clark* v. *Smith* (1844), 6 M. & G. 1051 ; *Jones* v. *Bonner* (1848), 2 Ex. 230 ; 76 R. R. 586 ; *Reynolds* v. *Reynolds* (1909), 26 T. L. R. 104, C. A.

(*a*) *Re Sullivan* v. *Pearson* (1868), 38 L. J. Q. B. 65 ; L. R. 4 Q. B. 153.

(*b*) *Westacott* v. *Bevan*, [1891] 1 Q. B. 774 ; 60 L. J. Q. B. 536 ; *Robarts* v. *Buée* (1878), 8 Ch. D. 198 ; 47 L. J. Ch. 414 ; *Pringle* v. *Gloag* (1879), 10 Ch. D. 676 ; 48 L. J. Ch. 380 ; *Jenner* v. *Morris* (1863), 11 W. R. 943.

(*c*) *Symons* (or *Simons*) v. *Blake* (1835), 4 L. J. Ex. 259 ; 2 C. M. & R. 416.

(*d*) *Goodfellow* v. *Gray*, [1899] 2 Q. B. 498 ; 68 L. J. Q. B. 1032, C. A. ; *Ward* v. *Haddrill*, [1904] 1 K. B. 399 ; 73 L. J. K. B. 277.

the client (*e*) ; but the country solicitor may apply for such an order, and the Court will then direct the costs of the London agent to be paid out of the fund in question to the extent of the country solicitor's interest therein (*f*). The London agent in no case has any higher right as against the client than the country solicitor (*g*).

*Shipmaster's Lien*

Every shipmaster has a maritime lien on the ship and freight for his wages, and for disbursements or liabilities properly made or incurred by him on account of the ship (*h*), and has a possessory lien on the cargo for freight and general average contributions due from the owners thereof (*i*). The lien for disbursements and liabilities is confined to such disbursements and liabilities as are made or incurred by the master in the ordinary course of his duty as such (*k*).

Maritime liens do not depend upon possession, but remain attached to the ship, notwithstanding any changes in the ownership (*l*), and are effectual even against a purchaser for value without notice (*m*). Where the rights of third parties are affected, however, such a lien may be lost by negligence or delay (*m*). Maritime liens are enforced by an Admiralty action *in rem*, in which the Court arrests and takes possession of the ship, in order, by sale or otherwise, to realise the amount of the lien (*n*). They are payable in the inverse order of their attachment on the *res* (*o*). Thus, a bottomry bond has priority to a maritime lien for wages and disbursements earned and made in the previous voyage to that in which the bond was given ; and *vice versa* (*o*). The master's maritime lien for wages or disbursements, whenever earned or made, has priority, as a general rule, to the claim of a purchaser or mortgagee (*p*), and all other claims, except for salvage and collision (*q*). Where, however, the master binds himself personally by a bottomry bond, or personally guarantees the payment of a mortgage debt, he cannot claim priority for his lien to the prejudice of the bondholder or mortgagee (*r*). So, where a master,

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(*e*) *Macfarlane* v. *Lister* (1888), 37 Ch. D. 88 ; 57 L. J. Ch. 92, C. A.

(*f*) *Tardrew* v. *Howell* (1861), 31 L. J. Ch. 57 ; 3 Giff. 381.

(*g*) *Peatfield* v. *Barlow* (1869), L. R. 8 Eq. 61 ; 38 L. J. Ch. 310 ; *Cockayne* v. *Harrison* (1873), L. R. 15 Eq. 298 ; 42 L. J. Ch. 660.

(*h*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 167 ; *The Neptune* (1824), 1 Hag. Ad. 227.

(*i*) *The Galam* (1863), 33 L. J. Adm. 97, P. C. ; *Kirchner* v. *Venus* (1858), 12 Moo. P. C. 361, P. C. And see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 494 to 498.

(*k*) *The Castlegate*, [1893] A. C. 38 ; 62 L. J. P. C. 17, H. L. ; *The Orienta*, [1895] P. 49 ; 64 L. J. P. 32, C. A. ; *The Fairport* (1882), 8 P. D. 48 ; 52 L. J. Ad. 21. Comp. *The Ripon City*, [1897] P. 226 ; 66 L. J. P. 110.

(*l*) *The Charles Amelia* (1868), L. R. 2 Ad. 330 ; 38 L. J. Ad. 17.

(*m*) *Harmer* v. *Bell* (*The Bold Buccleugh*) (1850), 7 Moo. P. C. 267 ; 83 R. R. 43, P. C. ; *The Europa* (1863), 32 L. J. Ad. 188 ; 2 Moo. P. C. (N.S.) 1.

(*n*) *The Cella* (1888), 13 P. D. 82 ; 57 L. J. Ad. 55, C. A.

(*o*) *The Hope* (1872), 28 L. T. 287 ; *The William Safford* (1860), Lush. 69.

(*p*) *The Ringdove* (1886), 11 P. D. 120 ; 55 L. J. P. 56 ; *The Mary Ann* (1865), L. R. 1 Ad. 8 ; *The Hope* (1872), 28 L. T. 287.

(*q*) *The Panthea* (1871), 25 L. T. 389 ; *The Elin* (1883), 8 P. D. 129 ; 52 L. J. Ad. 55, C. A.

(*r*) *The Salacia* (1863), 32 L. J. Ad. 41. Comp. *The Edward Oliver* (1867), L. R. 1 Ad. 379 ; 36 L. J. Ad. 13 ; *The Daring* (1868), L. R. 2 Ad. 260 ; 37 L. J. Ad. 29 ; *The Bangor Castle* (1896), 74 L. T. 768.

who was also a part owner, ordered necessaries, it was held that the claim for the necessaries had priority to that of the master for his wages and disbursements (*s*) ; but the priority of a master's lien to the claim of a mortgagee is not affected by the circumstance that the master is also a part owner, unless he is one of the mortgagors (*t*).

*Illustrations*

1. An auctioneer who is employed to sell goods has a lien on the goods for his charges and commission (*u*).

2. Books and papers are intrusted to a parliamentary agent by the clerk of the trustees of a public road, for the purpose of obtaining a renewal of their Act of Parliament. The agent has a lien on the books and papers for the amount of his bill of costs (*a*).

3. A carries on a business in his own name as agent for B. B becomes bankrupt. A, being liable to the creditors of the business by reason of his having carried it on in his own name, has a lien upon the goods and chattels in his possession belonging to B to the extent of such liability (*b*).

4. A carries on a business in his own name as agent for B, and deals with the possession of the goods of such business as if he were the owner thereof. He accepts certain bills of exchange drawn by B. Both become bankrupt. A's trustee in bankruptcy has a lien upon the goods in A's possession to the extent of A's liability upon current bills as well as for other amounts due to him from B (*c*).

5. A factor accepts bills of exchange on the faith of a consignment of goods, which are duly delivered to and sold by him. The principal dies during the currency of some of the bills. The factor has a lien upon the proceeds of the goods for the amount of the bills not yet due, as well as for the amount of those which he has paid (*d*). So, a factor who becomes a surety for his principal has a lien upon the proceeds of goods sold by him, for the amount guaranteed (*e*).

6. An agent was appointed by a company to sell goods on their behalf in a shop taken for that purpose, and it was agreed that he should from time to time accept bills representing the value of the goods in his hands for sale. Goods were consigned to the agent, and he accepted a bill for their value. Before the bill became due, the company was wound up, and the liquidators took possession of and sold the goods. Held, that the agent, having paid the bill, had a lien upon the goods for the amount, and was entitled to be repaid out of the proceeds thereof in preference to the other creditors of the company (*f*).

7. *Goods or chattels must be in agent's possession.*—A bought goods as a factor for and on behalf of B, and it was agreed that the goods should remain

(*s*) *The Jenny Lind* (1872), L. R. 3 Ad. 529 ; 41 L. J. Ad. 63 ; *The Eva*, [1921] P. 454.
(*t*) *The Feronia* (1868), L. R. 2 Ad. 65 ; 37 L. J. Ad. 60.
(*u*) *Williams* v. *Millington* (1788), 1 H. Bl. 81.
(*a*) *Ridgway* v. *Lees* (1856), 25 L. J. Ch. 584.
(*b*) *Foxcraft* v. *Wood* (1828), 4 Russ. 487.
(*c*) *Re Fawcus, ex p. Buck* (1876), 3 Ch. D. 795.
(*d*) *Hammonds* v. *Barclay* (1802), 2 East 227 ; *Pulteney* v. *Keymer* (1800), 3 Esp. 182.
(*e*) *Drinkwater* v. *Goodwin* (1775), Cowp. 251.
(*f*) *Re Pavy's Felted Fabric Co.* (1876), 1 Ch. D. 631 ; 45 L. J. Ch. 318.

upon the premises of the seller at a rent to be paid by B. After a time, A was requested by the seller to remove the goods, but did not do so. Subsequently, without B's authority or instructions, A removed the goods to his own premises, and about the same time a petition in bankruptcy was presented against B. Held, that the possession of the goods continued in B, and that A had therefore no lien upon them (*g*). So, where a factor accepted bills upon the faith of a consignment of goods, and both he and the principal became bankrupt before the arrival of the cargo, it was held that the factor's trustee in bankruptcy had no lien upon the cargo, and therefore no claim against the principal's trustee, who had sold the cargo and received the price, because the goods had never been in the factor's possession (*h*). Constructive possession of goods by the agent is, however, sufficient for the purpose of establishing his lien thereon (*i*). And an agreement, made for valuable consideration, to hand over a bill of lading to an agent for the purpose of giving him a security on the goods represented thereby, gives the agent a right, in equity, to the bill of lading and possession of the goods, as against the principal and his creditors (*k*).

8. *Goods in the order and disposition of the principal.*—A was appointed by a Glasgow firm to manage a warehouse in London, and it was expressly agreed that he should have a lien upon the goods stored in the warehouse. The business was carried on, and the goods were stored, in the name of the firm, who became bankrupt. Held, that the goods were in the order and disposition of the firm, and that in consequence of the " order and disposition " clause of the Bankruptcy Act, A's lien was not effective, though he had physical custody and control of the goods (*l*).

9. *Debt or obligation must be incurred in course of the agency.*—A, a factor, sold goods in his own name on B's behalf to C. C subsequently sent goods to A for sale, never having employed him as a factor before. C became bankrupt. Held, that A had no lien upon C's goods for the price of the goods sold by him on B's behalf. The lien of an agent is confined to what is due to him as such agent, and does not extend to a debt incurred before the commencement of the agency (*m*).

10. *The goods or chattels must be obtained lawfully.*—Where an agent of the managing owner of a ship made the freight payable to himself without authority to do so, it was held that he had no lien on the freight received by him for a debt due from the principal (*n*).

11. *The goods or chattels must be acquired in the same capacity as that in which the lien is claimed.*—A factor insures a ship on his principal's behalf, the transaction being quite distinct and separate from his duties as factor. His general lien does not extend to the policy of insurance, because he did

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(*g*) *Taylor* v. *Robinson* (1818), 2 Moo. 730.
(*h*) *Kinloch* v. *Craig* (1790), 3 T. R. 119, 783, H. L.
(*i*) *Bryans* v. *Nix* (1839), 4 M. & W. 775 ; 8 L. J. Ex. 137.
(*k*) *Ex p. Barber* (1843), 3 M. D. & De G. 174 ; *Lutscher* v. *Comptoir d'Escompte* (1876), 1 Q. B. D. 709.
(*l*) *Hoggard* v. *Mackenzie* (1858), 25 Beav. 493. See Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 38 (2) (c).
(*m*) *Houghton* v. *Matthews* (1803), 3 B. & P. 485.
(*n*) *Walshe* v. *Provan* (1853), 8 Ex. 843 ; 22 L. J. Ex. 355.

not acquire it in the capacity of factor (*o*). So, if a policy be left merely for safe custody in an agent's hands, he has no general lien thereon for advances (*p*). And a banker's lien for the general balance due to him is confined to property deposited with him in the capacity of a banker, and does not extend, *e.g.*, to boxes of securities left with him merely for safe custody (*q*). But it extends to all bills, cheques, and money paid into the bank, and to all documents and securities deposited with him as a banker (*q*).

12. *Must be no agreement inconsistent with the lien.*—A life policy was deposited at a bank, with a memorandum charging it with overdrafts not exceeding a specified amount. Held, that the banker's general lien was excluded by the special contract, such contract being inconsistent with the existence of a general lien on the policy (*r*). So, where a partner deposited a lease with a banker to secure a particular advance to his firm, it was held that the banker had no lien thereon for the general balance due from the firm (*s*). If a factor expressly agree to deal in a particular way with the proceeds of goods deposited with him for sale, his general lien is thereby excluded (*t*). But the lien is not excluded unless the express contract be clearly inconsistent with its existence (*u*). Thus, where certain securities were deposited with stockbrokers for a specific loan, and they were given a power of sale, it was held that their general lien extended to such securities (*a*). So, an agreement that there shall be monthly settlements does not affect the lien of an insurance broker for premiums upon policies in his hands (*b*). And the general lien of a factor is not excluded merely because he acts under special instructions to sell in his principal's name and at a particular price (*c*).

13. A consigns goods to B, who transfers the bill of lading to his factor C, to secure £1,000. B becomes bankrupt. C has no lien on the bill of lading for a general balance due from B, and A may stop the goods *in transitu*, subject to C's claim for £1,000 (*d*).

*No Lien on Property Intrusted to Agent for Special Purpose Inconsistent Therewith*

14. Certain exchequer bills were deposited at a bank, to be kept in a box under lock and key, the key being kept by the customer. The bills were subsequently intrusted to the banker, with instructions to obtain the interest

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(*o*) *Dixon* v. *Stansfield* (1850), 10 C. B. 398.
(*p*) *Muir* v. *Fleming* (1823), D. & R. N. P. C. 29.
(*q*) *Misa* v. *Currie* (1876), 1 App. Cas. 554 ; 45 L. J. Ex. 852, H. L. ; *London Chartered Bank* v. *White* (1879), 4 App. Cas. 413 ; 48 L. J. P. C. 75, P. C. ; *Scott* v. *Franklin* (1812), 15 East 428.
(*r*) *Re Bowes, Strathmore* v. *Vane* (1886), 33 Ch. D. 586 ; 56 L. J. Ch. 143. See also *Ex p. M'Kenna* (1861), 30 L. J. Bk. 20 ; 3 De G. F. & J. 629 ; *Vanderzee* v. *Willis* (1789), 3 Bro. C. C. 21.
(*s*) *Wolstenholm* v. *Sheffield Bank* (1886), 54 L. T. 746.
(*t*) *Walker* v. *Birch* (1795), 6 T. R. 258.
(*u*) *Brandao* v. *Barnett* (1846), 12 C. & F. 787, H. L. ; *Re European Bank, Agra Bank's claim* (1872), L. R. 8 Ch. 41 ; *Davis* v. *Bowsher* (1794), 5 T. R. 488.
(*a*) *Jones* v. *Peppercorne* (1858), Johns. 430 ; 28 L. J. Ch. 158. See also *Re London and Globe Finance Corpn.*, [1902] 2 Ch. 416 ; 71 L. J. Ch. 893.
(*b*) *Fisher* v. *Smith* (1878), 4 App. Cas. 1 ; 48 L. J. Ex. 411, H. L.
(*c*) *Stevens* v. *Biller* (1883), 25 Ch. D. 31 ; 53 L. J. Ch. 249, C. A. ; *König* v. *Brandt* (1901), 84 L. T. 748, C. A.
(*d*) *Spalding* v. *Ruding* (1843), 12 L. J. Ch. 503 ; 6 Beav. 376.

on them, and get them exchanged for new bills, and to deposit the new bills in the box as before. Held, that the banker's lien did not attach to the original bills or to those for which they were exchanged, the special purpose for which they were placed in his hands being inconsistent with a right of general lien (*e*).

15. A consigns goods to B for sale, and in sending B the bill of lading tells him that those goods will cover a bill of exchange which he has drawn in favour of C, and asks him to duly honour such bill. C presents the bill to B, who refuses to accept it. The cargo duly arrives, and A becomes bankrupt. B cannot claim a general lien on the cargo, unless he pays the bill of exchange (*f*). Where an agent accepts goods with express directions to apply them or their proceeds in a particular way, he cannot set up his general lien in opposition to those directions (*f*). So, if A sends bills to B with instructions to discount them, and apply the proceeds for a particular purpose, and B does not discount them, but receives the amount thereof after A has become bankrupt, A's trustee in bankruptcy is entitled at his option to recover the value of the bills in trover, or to recover the proceeds as money had and received to his use, and B has no right to set off a debt due to him from A (*g*).

16. A factor, who acted as such for the owners of a ship, asked the master to let him have the certificate of registry for the purpose of paying certain duties at the custom house. Held, that his general lien as factor did not attach to the certificate (*h*).

17. A deed, dealing with two distinct properties, was deposited at a bank, with a memorandum pledging one of the properties to secure a specific sum and also the general balance due to the banker. Held, that the banker had no lien upon the other property, the deed having been deposited with a specific intention inconsistent therewith (*i*). So, a banker has no lien upon muniments of title casually left at the bank after a refusal by him to advance money upon their security (*k*).

18. *Solicitor's Charging Lien.*—Where, in a suit by a *cestui que trust* against his trustee, the plaintiff, after the appointment of a receiver, compromised with the defendant without consulting his solicitor, it was held that the solicitor was entitled to a first charge on the plaintiff's interest in the trust property (*l*). And, where a defendant was ordered to pay money into Court to abide the event of an action, and after he had paid it in the parties collusively compromised the action, the plaintiff's solicitor was held entitled to a charging order on the amount so paid in (*m*). So, where an action was dismissed, with costs amounting to £298, which were duly paid, and upon an appeal by the plaintiff, the decision was reversed and the defendant ordered to repay the £298, together with the

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(*e*) *Brandao* v. *Barnett* (1846), 12 C. & F. 787 ; 69 R. R. 204, H. L.

(*f*) *Frith* v. *Forbes* (1862), 32 L. J. Ch. 10 ; 4 De G. F. & J. 409 ; *Colvin* v. *Hartwell* (1837), 5 Cl. & F. 484, H. L. Comp. *König* v. *Brandt* (1901), 84 L. T. 748, C. A.

(*g*) *Buchanan* v. *Findlay* (1829), 9 B. & C. 738 ; *Seligmann* v. *Huth* (1877), 37 L. T. 488, C. A. ; *Hill* v. *Smith* (1844), 12 M. & W. 618 ; 13 L. J. Ex. 243 ; *Ex p. Gomez, re Yglesias* (1875), L. R. 10 Ch. 639.

(*h*) *Burn* v. *Brown* (1817), 2 Stark. 272.

(*i*) *Wylde* v. *Radford* (1864), 33 L. J. Ch. 51.

(*k*) *Lucas* v. *Dorrien* (1817), 7 Taunt. 278.

(*l*) *Twyman* v. *Porter* (1870), L. R. 11 Eq. 181 ; 40 L. J. Ch. 30. And see *Re Wright's Trusts*, [1901] 1 Ch. 317 ; 70 L. J. Ch. 119, C. A.

(*m*) *Moxon* v. *Sheppard* (1890), 24 Q. B. D. 627 ; 59 L. J. Q. B. 286.

costs of the appeal, amounting to £165, it was held that the solicitors who acted for the plaintiff on the appeal were entitled, in addition to the £165, to a charge on the £298, for the extra costs of the appeal as between solicitor and client (*n*).

## Article 74

CONFINED TO RIGHTS OF PRINCIPAL, EXCEPT IN THE CASE OF MONEY OR NEGOTIABLE SECURITIES

The possessory lien of an agent attaches only upon goods or chattels in respect of which the principal has, as against third persons, the right or power to create the lien, and except in the case of money or negotiable securities, and subject to any statutory provision to the contrary (*o*), is confined to the rights of the principal in the goods or chattels at the time when the lien attaches, and is subject to all rights and equities of third persons available against the principal at that time (*p*). The lien of an agent upon money or negotiable securities deposited with him by or in the name of the principal is not affected by the rights or equities of third persons, and is as effectual as if the principal were the absolute owner of such money or securities, provided that at the time when the lien of the agent attaches he has no notice of any defect in the title of the principal thereto (*q*).

*Illustrations*

1. No solicitor or other agent can have a lien on the share register or minute book of a joint stock company, because the directors have no power to create any lien that could interfere with the use of such register or book for the purposes of the company (*r*). So, no lien can attach upon such books of a company as, under the articles of association or the Companies Acts, ought to be kept at the registered office of the company (*s*). And where documents come into the hands of a solicitor pending the winding-up of a company, he cannot claim any lien thereon that would interfere with the winding-up (*r*). But the fact that a company has issued debentures as a floating security does not prevent an agent from acquiring a lien on the title deeds of the company, and such a lien has priority to the claims of the debenture holders (*t*).

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(*n*) *Guy* v. *Churchill* (1887), 35 Ch. D. 489 ; 56 L. J. Ch. 670, C. A.

(*o*) *E.g.*, Factors Act, 1889 (52 & 53 Vict. c. 45) : see Article 9 ; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25.

(*p*) See Illustrations. And see *Att.-Gen.* v. *Trueman* (1843), 13 L. J. Ex. 70 ; 11 M. & W. 694 ; *Att.-Gen.* v. *Walmsley* (1843), 13 L. J. Ex. 66 ; 12 M. & W. 179 ; *Re Harrald, Wilde* v. *Walford* (1884), 53 L. J. Ch. 505, C. A. ; *Manningford* v. *Toleman* (1845), 1 Coll. 670 ; *Re Union Cement Co.* (1872), 26 L. T. 240 ; *Peat* v. *Clayton*, [1906] 1 Ch. 659 ; 75 L. J. Ch. 344.

(*q*) Illustration 9. *Tindall* v. *Barnett* (1887), 3 T. L. R. 476.

(*r*) *Re Capital Fire Ins. Ass., ex p. Beall* (1883), 24 Ch. D. 408 ; 53 L. J. Ch. 71, C. A. ; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96 ; 78 L. J. Ch. 132.

(*s*) *Re Anglo-Maltese Dock Co.* (1885), 54 L. J. Ch. 730.

(*t*) *Brunton* v. *Electric Engineering Corpn.*, [1892] 1 Ch. 434 ; 61 L. J. Ch. 256. See *Re Dee Estates*, [1911] 2 Ch. 85 ; 80 L. J. Ch. 461, C. A.

2. The directors of a building society, which has no borrowing powers, overdraw the banking account of the society, and agree that certain deeds deposited at the bank shall be held as security for the general balance. The transaction is *ultra vires*, and the banker has no lien on the deeds for the overdraft (*u*). He is, however, in equity, entitled to hold them as security for so much of the money advanced as he can show to have been actually applied in payment of the debts and liabilities of the society.

3. A solicitor or other agent is employed by trustees. He has no lien on the trust funds for his expenses (*a*). So, a solicitor employed by a trustee in bankruptcy has no lien for costs on property of the bankrupt recovered by him as such solicitor (*b*).

4. Deeds are deposited with a solicitor by a tenant for life. The solicitor has no lien on the deeds as against the remainderman (*c*). The lien of a solicitor upon deeds and papers deposited with him by a client is confined to the rights of the client therein, and is subject to all rights and equities of third persons available against the client (*d*). So, a solicitor or other agent has no lien, as such, on the separate property of a partner for the obligations of the firm (*e*).

5. A mortgage is paid off, and the property is reconveyed to the mortgagor. The mortgagee's solicitor has no lien as against the mortgagor on the title deeds for costs due from the mortgagee, except the cost of the reconveyance, even if such costs were incurred in respect of the mortgaged property, *e.g.*, the costs of an attempted sale by the mortgagee (*f*). So, where a mortgagor borrowed the title deeds from the mortgagee and sold the property, it was held that the solicitor of the mortgagor, to whom the deeds were handed for the purpose of completing the sale, had no lien thereon for costs due from the mortgagor in respect of other transactions (*g*).

6. A sells goods to B, and ships them to his order. Before the goods arrive, A and B agree to rescind the contract for sale. The wharfinger cannot, on the arrival of the goods at his wharf, claim a lien on them as against A, for a general balance due from B (*h*). So, a wharfinger has no lien on goods, as against a buyer, for charges becoming due from the seller after the wharfinger has had notice of the sale (*i*).

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(*u*) *Cunliffe* (or *Brooks*) v. *Blackburn Building Society* (1884), 9 App. Cas. 857 ; 54 L. J. Ch. 376, H. L.

(*a*) *Staniar* v. *Evans* (1887), 3 T. L. R. 215 ; *Worrall* v. *Harford* (1802), 8 Ves. 4 ; *Lightfoot* v. *Keane* (1836), 3 L. J. Ex. 257 ; 1 M. & W. 745 ; *Hall* v. *Laver* (1842), 1 Hare 571 ; *Francis* v. *Francis* (1854), 5 De G. M. & G. 108.

(*b*) *Re Humphreys, ex p. Lloyd-George*, [1898] 1 Q. B. 520 ; 67 L. J. Q. B. 412, C. A. See also *Meguerditchian* v. *Lightbound*, [1917] 2 K. B. 298 ; 86 L. J. K. B. 889, C. A.

(*c*) *Turner* v. *Letts* (1855), 24 L. J. Ch. 638 ; 20 Beav. 185 ; 109 R. R. 97 ; *Ex p. Nesbitt* (1805), 2 Sch. & Lef. 279.

(*d*) *Hollis* v. *Claridge* (1813), 4 Taunt. 807 ; *Pratt* v. *Vizard* (1833), 5 B. & Ad. 808 ; *Pelly* v. *Wathen* (1851), 1 De G. M. & G. 16 ; *Oxenham* v. *Esdaile* (1828), 2 Y. & J. 493 ; *Furlong* v. *Howard* (1804), 2 Sch. & Lef. 115.

(*e*) *Turner* v. *Deane* (1849), 18 L. J. Ex. 343 ; 3 Ex. 836 ; *Watts* v. *Christie* (1849), 18 L. J. Ch. 173 ; 11 Beav. 546.

(*f*) *Re Llewellyn*, [1891] 3 Ch. 145 ; 60 L. J. Ch. 732 ; *Wakefield* v. *Newbon* (1844), 6 Q. B. 276 ; 13 L. J. Q. B. 258.

(*g*) *Young* v. *English* (1843), 7 Beav. 10.

(*h*) *Richardson* v. *Goss* (1802), 3 B. & P. 119.

(*i*) *Barry* v. *Longmore* (1840), 12 A. & E. 639.

7. A, an owner of land, deposits the title deeds at a bank as security for his general balance, and subsequently contracts to sell the land to B, who has notice of the terms of the deposit. The banker has notice of the sale, but continues the account, and makes fresh advances to A, who pays in sums from time to time. B pays the purchase-money to A by instalments, without notice of such advances. A having paid into the bank sums exceeding in the aggregate the amount owing to the bank at the time of the contract of sale, the banker has no lien on the title deeds or charge on the land as against B, though on the general balance there was always a debt due to the bank (*k*).

8. Goods are consigned to a factor for sale, the principal having committed an act of bankruptcy. The factor, with notice of the act of bankruptcy, advances money to the principal. The factor has no lien on the goods for the advances, and having sold them and received the proceeds, must account for such proceeds to the trustee in bankruptcy, because the principal had no power after the act of bankruptcy to create any lien (*l*). But not if the factor had made the advances without notice of the act of bankruptcy and before the date of the receiving order.

9. *Negotiable instruments.*—A banker borrowed a specific sum of money from a stockbroker, with whom he deposited, as security, negotiable instruments belonging to third persons. The banker dealt as a principal with the broker, having had many previous transactions with him, and there was nothing to lead the broker to believe that the securities were not the property of the banker. Held, that the broker's general lien for the balance due to him from the banker attached upon the securities, although the banker had been guilty of gross fraud (*m*). So, the general lien of a banker upon negotiable instruments deposited with him is not affected by the circumstance that the customer who deposits them is acting as agent for a third person (*n*), nor by equities between the customer and third persons (*o*). But an agent has no lien upon a negotiable instrument, as against the true owner, for advances made after notice of a defect in the title of the principal (*p*). So, a banker has no lien on a fund in his hands, in respect of any claims arising after notice of an assignment of the fund to a third person (*q*), or after notice that the fund belongs to a third person (*r*).

(*k*) *London and County Bank* v. *Ratcliffe* (1881), 6 App. Cas. 722 ; 51 L. J. Ch. 28, H. L.

(*l*) *Copland* v. *Stein* (1799), 8 T. R. 199. See Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 45.

(*m*) *Jones* v. *Peppercorne* (1858), Johns. 430 ; 28 L. J. Ch. 158.

(*n*) *Brandao* v. *Barnett* (1846), 12 C. & F. 787, H. L. ; *Baker* v. *Nottingham Bank* (1891), 60 L. J. Q. B. 542 ; *Bank of New South Wales* v. *Goulburn Valley Butter Factory*, [1902] A. C. 543 ; 71 L. J. P. C. 112, P. C.

(*o*) *Misa* v. *Currie* (1876), 1 App. Cas. 554 ; 45 L. J. Ex. 852, H. L. ; *Johnson* v. *Robarts* (1875), L. R. 10 Ch. 505 ; 44 L. J. Ch. 678.

(*p*) *Solomons* v. *Bank of England* (1810), 13 East 135 ; *De la Chaumette* v. *Bank of England* (1829), 9 B. & C. 208. And see *Redfern* v. *Rosenthal* (1902), 86 L. T. 855, C. A.

(*q*) *Jeffreys* v. *Agra Bank* (1866), L. R. 2 Eq. 674 ; 35 L. J. Ch. 686.

(*r*) *Locke* v. *Prescott* (1863), 32 Beav. 261 ; *Ex p. Kingston, re Gross* (1871), L. R. 6 Ch. 632 ; 40 L. J. Bk. 91 ; *Cuthbert* v. *Robarts*, [1909] 2 Ch. 226 ; 78 L. J. Ch. 529, C. A.

## Article 75

### LIEN OF SUB-AGENTS

Except where otherwise expressly provided by statute (*s*), a sub-agent who is employed without the authority, express or implied, of the principal, has no lien on the goods or chattels of the principal, as against the principal (*t*).

Where a sub-agent is appointed by an agent with the authority, express or implied, of the principal, the sub-agent—

(a) has the same right of lien, general or particular, against the principal, on the goods and chattels of the principal, in respect of claims arising in the course of the sub-agency, as he would have had against the agent if the agent had been the owner of the goods and chattels ; and such right of lien is not liable to be defeated by any settlement between the principal and agent to which the sub-agent is not a party (*u*) ;

(b) has the same right of general lien on the goods and chattels of the principal in respect of all claims, whether arising in the course of the sub-agency or not, as he would have had against the agent if the agent had been the owner of the goods and chattels ; provided that, as against the principal, such right of lien is available only to the extent of the lien, if any, to which the agent would have been entitled if the goods and chattels had been in his possession (*u*) ; and

(c) has the same right of lien, general or particular, on the goods and chattels of the principal, as he would have had against the agent if the agent had been the owner of the goods and chattels, provided that at the time when the lien attaches he believes on reasonable grounds that the agent is the owner of the goods and chattels and is acting in the matter on his own behalf (*a*).

#### *Lien on Marine Policy*

By the Marine Insurance Act, 1906 (*b*), s. 53, where a marine policy is effected on behalf of the assured by a broker, unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy ; and where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he

(*s*) See Article 88 ; Sale of Goods Act, 1893, s. 25.
(*t*) Illustration 1. See also § 465 of the American Restatement.
(*u*) Illustrations 5 and 6. *Blackburn* v. *Kymer* (1814), 5 Taunt. 584 ; *Cahill* v. *Dawson* (1857), 26 L. J. C. P. 253 ; 3 C. B. (N.S.) 106 ; *Mildred* v. *Maspons* (1883), 8 App. Cas. 874 ; 53 L. J. Q. B. 33, H. L.
(*a*) Illustrations 2 to 4.
(*b*) 6 Edw. 7, c. 41.

had reason to believe that such person was only an agent. If, however, the broker part with possession of the policy, the lien is lost ; and it does not revive by regaining possession with knowledge that the person who dealt with him was an agent (*c*).

*Illustrations*

1. A factor delegates his authority to a sub-agent, without the assent of the principal. The sub-agent has no lien on the principal's goods, even for duties paid in respect of those goods (*d*).

2. An agent, on behalf, and with the authority, of his principal, employs an insurance broker to effect a policy, the broker having no notice, and being unaware, that he is dealing with an agent. The broker has a lien on the policy for the general balance due to him from the agent, and is entitled to apply the proceeds of the policy in payment of such balance, notwithstanding that he has, in the meantime, received notice of the principal's rights (*e*).

3. A, a commission agent, employed B, a broker, to buy certain goods, B having no knowledge that A was acting as an agent. B bought and paid for the goods and retained the warrants therefor. A was in fact acting for C, and C paid A for the goods. B, on A's instructions, resold the goods, and applied the proceeds in reduction of a running account between himself and A. In an action by C against B for converting the goods, it was held that B was not liable, because at the time of the sale he had a lien on the goods for the balance due to him from A (*f*).

4. A employed B to collect general average contributions under an insurance policy. B, in the ordinary course of business, employed C, an insurance broker, to collect the contributions, C being unaware that B was acting as an agent. C collected the contributions, and B became bankrupt. Held, in an action by A against C for the contributions, as money had and received to his use, that C was entitled to set off the amount of a debt due to him from B (*g*).

5. An agent, on behalf of his principal, employs an insurance broker to effect a policy, the broker being aware that the agent is acting for a principal. The principal pays the agent the amount of the premiums due in respect of the policy. Notwithstanding such payment, the broker has a lien upon the policy for premiums in respect thereof paid by him, or for which he is liable (*h*). But he has no lien, as against the principal, for a general balance due from the agent in respect of other transactions (*i*).

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(*c*) *Near East Relief* v. *King*, [1930] 2 K. B. 40 ; 90 L. J. K. B. 522.

(*d*) *Solly* v. *Rathbone* (1814), 2 M. & S. 298.

(*e*) *Mann* v. *Forrester* (1814), 4 Camp. 60 ; *Maanss* v. *Henderson* (1801), 1 East 335 ; *Westwood* v. *Bell* (1815), 4 Camp. 349.

(*f*) *Taylor* v. *Kymer* (1832), 3 B. & Ad. 320.

(*g*) *Montagu* v. *Forwood*, [1893] 2 Q. B. 350, C. A. And see *New Zealand, etc., Land Co.* v. *Watson* (1881), 7 Q. B. D. 374 ; 50 L. J. Q. B. 433, C. A.

(*h*) *Fisher* v. *Smith* (1878), 4 App. Cas. 1 ; 48 L. J. Ex. 411, H. L. ; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 53 (2).

(*i*) *Mildred* v. *Maspons* (1883), 8 App. Cas. 874 ; 53 L. J. Q. B. 33, H. L. ; *Levy* v. *Barnard* (1818), 2 Moo. 34 ; *Man* v. *Shiffner* (1802), 2 East 523 ; *Snook* v. *Davidson* (1809), 2 Camp. 218 ; *Maanss* v. *Henderson* (1801), 1 East 335 ; *Ladbrooke* v. *Lee* (1850), 4 De G. & S. 106 ; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 53 (2) ; *Fairfield Shipbuilding Co.* v. *Gardner* (1911), 104 L. T. 288 ; *Near East Relief* v. *King*, [1930] 2 K. B. 40 ; 99 L. J. K. B. 522.

6. As against the solicitor employing him, a London agent has a general lien upon all moneys recovered and documents deposited with him in the course of his employment (*k*), but as against the client, his general lien is limited to the amount due from the client to the country solicitor (*l*). As against both the country solicitor and the client, he has a lien upon money recovered and documents deposited with him in a particular suit, for the amount of his agency charges and disbursements in connection with that suit (*m*).

## Article 76

### HOW LIEN EXTINGUISHED OR LOST

The lien of an agent is extinguished or lost—

(a) by his entering into any agreement (*n*), or acting in any capacity (*o*), which is inconsistent with the continuance of the lien ;

(b) by waiver, express or implied. A waiver is implied whenever the conduct of the agent is such as to indicate an intention to abandon the lien, or is inconsistent with the continuance thereof (*p*). In particular, a waiver may be implied from his taking other security for the claim secured by the lien (*q*), if the nature of the security, or the circumstances in which it is taken, be inconsistent with the continuance of the lien (*r*), or be such as to indicate an intention to abandon it (*s*).

The possessory lien of an agent is extinguished by his voluntarily parting with the possession of the goods or chattels subject thereto (*t*), except where he is induced to do so by fraud (*u*), or the circumstances in which he parts with such possession are consistent with the continuance of the lien, and are such as to show that he intends to retain the lien (*a*) ; but it is not affected by the fact that possession has been obtained from him unlawfully or without his consent (*b*).

(*k*) *Lawrence* v. *Fletcher* (1874), 12 Ch. D. 858 ; *Bray* v. *Hine* (1818), 6 Price 203 ; *Re Jones and Roberts*, [1905] 2 Ch. 219 ; 74 L. J. Ch. 458, C. A.

(*l*) *Re Johnson, ex p. Edwards* (1881), 8 Q. B. D. 262 ; 51 L. J. Q. B. 108, C. A. ; *Moody* v. *Spencer* (1822), 2 D. & R. 6 ; *Waller* v. *Holmes* (1860), 1 Johns. & H. 239 ; 30 L. J. Ch. 24.

(*m*) *Dicas* v. *Stockley* (1836), 7 C. & P. 587 ; *Lawrence* v. *Fletcher*, *supra*.

(*n*) Illustration 1. *Forth* v. *Simpson* (1849), 13 Q. B. D. 680 ; 18 L. J. Q. B. 263 ; *How* v. *Kirchner* (1856), 11 Moo. P. C. 21.

(*o*) Illustrations 2 and 3.

(*p*) Illustrations 4 and 5.

(*q*) *Cowell* v. *Simpson* (1809), 16 Ves. 275 ; 10 R. R. 181.

(*r*) *Angus* v. *Maclachlan* (1881), 23 Ch. D. 330 ; 52 L. J. Ch. 587 ; *Tamvaco* v. *Simpson* (1866), L. R. 1 C. P. 363 ; 35 L. J. C. P. 196, Ex. Ch.

(*s*) Illustration 6. *The Albion* (1872), 27 L. T. 723 ; *Grant* v. *Mills* (1813), 2 Ves. & B. 306 ; 13 R. R. 101.

(*t*) Illustration 7. *Kruger* v. *Wilcox* (1754), Ambl. 252 ; *Bligh* v. *Davies* (1860), 28 Beav. 211.

(*u*) *Wallace* v. *Woodgate* (1824), R. & M. 193.

(*a*) Illustration 8.

(*b*) *Dicas* v. *Stockley* (1836), 7 C. & P. 587 ; *Re Carter* (1886), 55 L. J. Ch. 230.

The lien of an agent is not affected by the fact that the claim secured thereby becomes barred by a Statute of Limitations (*c*), or that the principal becomes bankrupt or insolvent (*d*), or sells or otherwise deals with the goods or chattels subject to the lien (*e*), after the lien has attached.

*Illustrations*

1. A shipmaster elects to allow the balance of his wages to remain in the hands of the managing owners at interest. He thereby surrenders his lien for such wages (*f*).

2. A solicitor acts for both mortgagor and mortgagee in carrying out a mortgage. The solicitor thereby loses his lien on the title deeds of the mortgaged property for costs due from the mortgagor, even if the costs were incurred prior to the mortgage, and the deeds are not permitted to be taken out of the solicitor's possession (*g*).

3. A solicitor prepares a marriage settlement, on the instructions of the intended husband, and retains it in his possession after the marriage. He has no lien on the settlement as against the trustees, the cost of preparing it being payable by the husband (*h*).

4. An agent causes goods upon which he has a lien to be taken in execution at his own suit. He thereby waives the lien, though the goods are sold to him under the execution, and are never removed from his premises (*i*).

5. Upon a demand being made against an agent by his principal for a chattel upon which the agent has a lien, the agent claims to retain the chattel on some other ground, without mentioning the lien. He thereby waives the lien (*k*).

6. A solicitor, having a lien for costs, takes a security for the costs, and does not tell the client that he intends to reserve the lien. He is deemed to waive the lien, it being the duty of a solicitor, if he intends to reserve his lien in such a case, to explain to the client that such is his intention (*l*).

7. An agent delivers goods, on which he has a lien, on board a ship, to be conveyed on account and at the risk of the principal. The agent thereby

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(*c*) *Spears* v. *Hartley* (1798), 3 Esp. 81 ; *Re Broomhead* (1847), 5 D. & L. 52 ; 16 L. J. Q. B. 355 ; *Curwen* v. *Milburn* (1889), 42 Ch. D. 424, C. A.

(*d*) Illustration 9. *Ogle* v. *Story* (1833), 4 B. & Ad. 735 ; *General Share Co.* v. *Chapman* (1877), 46 L. J. C. P. 79 ; *The Cella* (1888), 13 P. D. 82 ; 57 L. J. Ad. 55, C. A. ; *Ex p. Underwood* (1845), 9 Jur. 632 ; *Ex p. Moule* (1821), 5 Madd. 462 ; *Ex p. Markby* (1864), 11 L. T. 250.

(*e*) Illustration 10.

(*f*) *The Rainbow* (1885), 5 Asp. M. C. 479.

(*g*) *Re Nicholson, ex p. Quinn* (1883), 53 L. J. Ch. 302 ; *Re Mason* (1878), 10 Ch. D. 729 ; 48 L. J. Ch. 193 ; *Re Snell* (1877), 6 Ch. D. 105 ; *Re Messenger* (1875), 3 Ch. D. 317, not followed.

(*h*) *Re Lawrance, Bowker* v. *Austin*, [1894] 1 Ch. 556 ; 63 L. J. Ch. 205.

(*i*) *Jacobs* v. *Latour* (1828), 5 Bing. 130.

(*k*) *Weeks* v. *Goode* (1859), 6 C. B. (N.S.) 367 ; *Boardman* v. *Sill* (1808), 1 Camp. 410, n.

(*l*) *Re Morris*, [1908] 1 K. B. 473 ; 77 L. J. K. B. 265, C. A. ; *Re Taylor, ex p. Payne Collier*, [1891] 1 Ch. 590 ; 60 L. J. Ch. 525 ; *Bissell* v. *Bradford Tram Co.* (1893), 9 T. L. R. 337, C. A. ; *Groom* v. *Cheesewright*, [1895] 1 Ch. 730 ; *Re Douglas*, [1898] 1 Ch. 199 ; 67 L. J. Ch. 85. Comp. *Stevenson* v. *Blakelock* (1813), 1 M. & S. 535 ; 14 R. R. 525.

surrenders his lien on the goods, and he has no power to revive it by stopping the goods *in transitu* (*m*).

8. A, a solicitor, on the instructions of a mortgagor, prepares and engrosses a reconveyance, which he sends to the solicitor of the mortgagee with a request that he will hold it on A's account, he having a lien thereon. The mortgagee executes the reconveyance. A's lien is not, in the circumstances, prejudiced by his parting with the possession of the engrossment, nor by its being executed by the mortgagee as a deed (*n*). So, if an agent give up a chattel in order that the principal may sell it and account for the proceeds to the agent, he does not thereby lose his lien on the chattel (*o*).

9. Goods were consigned to a factor for sale, and after he had sold them the principal committed an act of bankruptcy. The factor subsequently received the price of the goods. Held, that he had a lien on the goods for the amount of a debt due to him from the principal, and that he was entitled, as against the trustee in bankruptcy, to retain the proceeds in payment of the debt (*p*). So, an order for the winding-up of a company does not affect the lien of a solicitor upon documents of the company, if the lien were acquired before the presentation of the winding-up petition (*q*).

10. The principal assigns to a third person goods in the possession of a factor. The assignment does not affect the factor's general lien on the goods (*r*). So, the lien of an agent upon a policy of insurance is effectual against a subsequent assignee of the policy who gives notice of the assignment to the insurer, though the agent has given no notice of his lien to the insurer (*s*).

## SECT. 4.—*Other Miscellaneous Rights*

### Article 77

#### RIGHTS IN RESPECT OF GOODS BOUGHT IN OWN NAME

Where an agent, by contracting personally (*t*), renders himself personally liable for the price of goods bought on behalf of his principal, the property in the goods, as between the principal and agent, vests in the agent, and does not pass to the principal until he pays for the goods, or the agent intends that it shall pass (*u*), and the agent has the same rights with regard to the disposal of the goods (*u*), and with regard to stopping them *in transitu* (*a*) as

(*m*) *Sweet* v. *Pym* (1800), 1 East 4 ; *Hathesing* v. *Laing* (1873), L. R. 17 Eq. 92 ; 43 L. J. Ch. 233.

(*n*) *Watson* v. *Lyon* (1855), 7 De G. M. & G. 288.

(*o*) *North Western Bank* v. *Poynter*, [1895] A. C. 56 ; 64 L. J. P. C. 27, H. L.

(*p*) *Robson* v. *Kemp* (1802), 4 Esp. 233.

(*q*) *Re Capital Fire Ins. Ass., ex p. Beall* (1883), 24 Ch. D. 408 ; 53 L. J. Ch. 71, C. A. ; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96 ; 78 L. J. Ch. 132.

(*r*) *Godin* v. *London Ass. Co.* (1758), 1 W. Bl. 103.

(*s*) *West of England Bank* v. *Batchelor* (1882), 51 L. J. Ch. 199.

(*t*) See Articles 116 to 121.

(*u*) *Jenkyns* v. *Brown* (1849), 14 Q. B. 496 ; 19 L. J. Q. B. 286 ; *Schuster* v. *M'Kellar* (1857), 26 L. J. Q. B. 281 ; 7 E. & B. 704 ; *Ex p. Banner, re Tappenbeck* (1876), 2 Ch. D. 278 ; 45 L. J. Bk. 73, C. A. Comp. *Hathesing* v. *Laing* (1873), L. R. 17 Eq. 92 ; 43 L. J. Ch. 233.

(*a*) *Imperial Bank* v. *London and St. Katharine's Docks* (1876), 5 Ch. D. 195 ; 46 L. J. Ch. 335 ; *Feise* v. *Wray* (1802), 3 East 93 ; *The Tigress* (1863), Brown. &

he would have had if the relation between him and his principal had been that of seller and buyer.

## Article 78

### RIGHT TO INTERPLEAD

Where adverse claims are made upon an agent in respect of any money, goods, or chattels in his possession, and he claims no interest in the subject-matter of the dispute other than for costs or charges, he may claim relief by way of interpleader (*b*), even as against his own principal whose title he has acknowledged (*c*), provided that he had no notice of the adverse claim at the time of such acknowledgment (*d*). Where the agent claims a lien on property as against the owner, whoever he may be, the lien is not such an interest as deprives him of the right to interplead in respect of the ownership of the property (*e*) ; but where he claims a lien or any other interest in the property, or part thereof, other than for costs or charges, as against a particular claimant, he is not permitted to interplead (*f*).

*Illustrations*

1. An agent has funds in his hands, upon which a third person claims to have been given a lien by the principal. The agent may interplead as against his principal and the third person (*g*).

2. A instructs a stockbroker to sell shares, and sends him the share certificate and blank transfers. The shares are claimed by B, who alleges that they were obtained from him by fraud. A sues the broker, claiming the return of the certificate and transfers. The broker may interplead (*h*).

3. A, a part-owner of a vessel, instructs B, a broker, to insure the vessel. B receives an amount due under the policy in respect of a loss, and the whole of the amount is claimed by A. A sues B for the whole amount, and certain other part-owners sue him for part thereof. B may interplead (*i*).

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Lush. 38 ; *Falk* v. *Fletcher* (1865), 34 L. J. C. P. 146 ; 18 C. B. (N.S.) 403 ; *Hawkes* v. *Dunn* (1831), 1 Tyr. 413 ; *Snee* v. *Prescott* (1743), 1 Atk. 245.

(*b*) R. S. C., Ord. 57 ; *Blyth* v. *Whiffin* (1872), 27 L. T. 330.

(*c*) *Attenborough* v. *London & St. Katharine's Docks* (1878), 3 C. P. D. 450 ; 47 L. J. C. P. 763, C. A. ; *Ex p. Mersey Docks and Harbour Board*, [1899] 1 Q. B. 546 ; 68 L. J. Q. B. 540, C. A. ; Illustrations 1 to 6. It would seem that, so far as they are decisions to the contrary, *Crawshay* v. *Thornton* (1836), 2 Myl. & C. 1 ; *Cooper* v. *De Tastet* (1829), Tamlyn 177 ; and *Nickolson* v. *Knowles* (1820), 5 Madd. 47, are no longer law since the C. L. P. Act, 1860 (23 & 24 Vict. c. 126).

(*d*) *Ex p. Davies, re Sadler* (1881), 19 Ch. D. 86, C. A.

(*e*) *Attenborough* v. *London & St. Katharine's Docks, supra ; Cotter* v. *Bank of England* (1833), 3 M. & S. 180.

(*f*) *Mitchell* v. *Hayne* (1824), 2 Sim. & S. 63 ; *Braddick* v. *Smith* (1832), 9 Bing. 84 ; *Moore* v. *Usher* (1835), 7 Sim. 383.

(*g*) *Smith* v. *Hammond* (1833), 6 Sim. 10.

(*h*) *Robinson* v. *Jenkins* (1890), 6 T. L. R. 69, 158, C. A.

(*i*) *Suart* v. *Welch* (1838), 4 Myl. & C. 305.

4. A deposits goods with B, a wharfinger, and afterwards requests him to transfer them to the name of C, reserving to himself a right to draw samples. B enters the goods in C's name. D then claims them as paramount owner, and A acquiesces in his claim. C also claims them. B may interplead as against C and D (*k*).

5. A intrusted a policy to B for a specified purpose. C, who had pledged the policy with A, and A each brought an action against B for the policy. Held, that B was entitled to interplead (*l*).

6. A, an auctioneer, sells goods on behalf of B, and whilst a portion of the proceeds is still in his hands, receives notice of a claim by C. B sues A for the balance of the proceeds. A may deduct his expenses and charges and interplead as to the residue (*m*).

## Article 79

### RIGHT TO AN ACCOUNT

Where the accounts between a principal and agent are of so complicated a nature that they cannot be satisfactorily dealt with in an action at law, the agent has a right to have an account taken in equity (*n*) ; but the relation of principal and agent is not alone sufficient to entitle an agent to an account in equity, when the matter can be dealt with in an action at law (*o*).

## Article 80

### NO RIGHT TO SUE PRINCIPAL ON CONTRACTS ENTERED INTO ON HIS BEHALF

Except in the case of insurance brokers, who may sue their principals for premiums due under policies effected by them even if they have not paid or settled with the underwriters (*p*), no agent has any right of action against his principal on any contract entered into on the principal's behalf, whether the agent is himself personally liable on the contract to the other contracting party or not (*q*).

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(*k*) *Mason* v. *Hamilton* (1831), 5 Sim. 19 ; *Pearson* v. *Cardon* (1831), 2 Russ. & M. 606 ; *Ex p. Mersey Docks and Harbour Board*, [1899] 1 Q. B. 546 ; 68 L. J. Q. B. 540, C. A. .

(*l*) *Tanner* v. *European Bank* (1865), L. R. 1 Ex. 261 ; 35 L. J. Ex. 151.

(*m*) *Best* v. *Hayes* (1862), 32 L. J. Ex. 129 ; 3 F. & F. 113 ; *Martinius* v. *Helmuth* (1815), Coop. 245 ; *Wright* v. *Freeman* (1879), 48 L. J. C. P. 276.

(*n*) *Padwick* v. *Hurst* (1854), 23 L. J. Ch. 657 ; 18 Beav. 575 ; *Blyth* v. *Whiffin* (1872), 27 L. T. 330 ; *Harrington* v. *Churchward* (1860), 29 L. J. Ch. 521 ; *Smith* v. *Leveaux* (1863), 33 L. J. Ch. 167 ; 1 H. & M. 123 ; *Waters* v. *Shaftesbury* (1866), 14 L. T. 184 ; *Shepard* v. *Brown* (1862), 7 L. T. 499.

(*o*) *Padwick* v. *Stanley* (1852), 9 Hare 627 ; *Dinwiddie* v. *Bailey* (1801), 6 Ves. 136. This is because the right of the principal may be founded on the fiduciary character of the agency.

(*p*) *Power* v. *Butcher* (1829), 8 L. J. (o.s.) K. B. 217 ; 5 M. & R. 327.

(*q*) Illustrations 1 and 2.

*Illustrations*

1. A, a foreign merchant, employs B to buy goods on commission. B buys the goods, and the vendors invoice them to him and take his acceptance for the price. B cannot sue A, as for goods sold and delivered (*r*). (His only remedy is an action for indemnity.)

2. A broker buys goods on behalf of an undisclosed principal. He cannot sue the principal for not accepting the goods, although, having contracted without naming the principal, he is, by a usage of trade, personally liable on the contract (*s*). Nor can he sue as for goods bargained and sold (*t*).

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(*r*) *Seymour* v. *Pychlau* (1817), 1 B. & A. 14.
(*s*) *Tetley* v. *Shand* (1872), 25 L. T. 658.
(*t*) *White* v. *Benekendorff* (1873), 29 L. T. 475 ; *Ex p. Dyster* (1816), 2 Rose 349.

# CHAPTER VIII

## RELATIONS BETWEEN THE PRINCIPAL AND THIRD PERSONS

### SECT. 1.—*Rights and Liabilities of the Principal on Contracts made by Agent*

### Article 81

ACTS WITHIN ACTUAL OR IMPLIED AUTHORITY

EVERY act done by an agent professedly on the principal's behalf, and within his actual authority, is binding on the principal with respect to persons dealing with the agent in good faith, even if the act be done fraudulently in furtherance of the agent's own interests, and not in the interests of the principal (*a*).

Every act done by an agent within his apparent authority, binds the principal, unless the agent is in fact unauthorised to do the particular act, and the person dealing with him has notice (*b*) that in doing such act he is exceeding his authority (*c*).

The statement in this article is not exhaustive since it applies only to actual or apparent authority. A third class of cases exists in which a principal will be bound although the agent has no actual or apparent authority, *e.g.*, dispositions under the Factors Act (*d*) ; the power of the agent to bind the principal by his acts arises from his position as an agent, but not from his authority (*e*). No private instructions given to an agent, of which the persons dealing with him have no notice, prevent the acts of the agent, within the scope of his implied authority, from binding the principal (*f*).

*Agents of Companies* (*g*)

Persons dealing with a limited company are deemed to have notice of the contents of its memorandum and articles of association (*h*) ; but where

(*a*) Illustration 1. (*b*) See Article 83.

(*c*) *Heyworth* v. *Knight* (1864), 33 L. J. C. P. 298 ; 17 C. B. (N.S.) 298 ; *Dyas* v. *Cruise* (1845), 2 J. & L. 460, Ir. ; *Ex p. Dixon, re Henley* (1876), 4 Ch. D. 133 ; 46 L. J. Bk. 20 ; *Waller* v. *Drakeford* (1853), 22 L. J. Q. B. 274 ; 1 El. & Bl. 749 ; *Nickson* v. *Brohan* (1718), 10 Mod. 109 ; *Strauss* v. *Francis* (1866), L. R. 1 Q. B. 379 ; 35 L. J. Q. B. 133 ; *Curlewis* v. *Birkbeck* (1863), 3 F. & F. 894 ; *Wright* v. *Bigg* (1852), 15 Beav. 592 ; 92 R. R. 568. And see Illustrations. See also, as to implied authority, pp. 51 *et seq.*, *ante*.

(*d*) These are dealt with in later Articles, see Articles 85 to 89, 96.

(*e*) See § 140 of the American Restatement on this principle and also ss. 141, 161-178, 194-202, and 17 C. B. R., at p. 253.

(*f*) *National Bolivian Navigation Co.* v. *Wilson* (1880), 5 App. Cas. 176, 209, H. L. ; *Smith* v. *M'Guire* (1858), 3 H. & N. 554 ; 27 L. J. Ex. 465 ; 117 R. R. 853 ; *Whitehead* v. *Tuckett* (1812), 15 East 400 ; 13 R. R. 509 ; *Fuentes* v. *Montis* (1868), L. R. 3 C. P. 268, 277.

(*g*) See 49 L. Q. R. 350 and 50 L. Q. R. 224 for discussions of this subject.

(*h*) See Illustration 15.

an act is done by directors within the scope of their powers, third persons are entitled to assume that all the necessary formalities and conditions have been duly complied with, unless they have notice of any irregularity (*i*).

*Illustrations*

1. A is authorised in writing to act as the agent of B for the purpose of underwriting policies of insurance, and carrying on the ordinary business of underwriting, at Lloyd's, in the name and on behalf of B, in accordance with the usual custom of Lloyd's. A, in his own interests, and in abuse of his authority, underwrites a guarantee policy in B's name, the assured acting in good faith, but having no knowledge of the existence of the written authority or of its terms. It is in the ordinary course of business at Lloyd's to underwrite such policies, and A was therefore acting within the scope of his actual authority, though in fraud of B. B is bound by the policy (*k*).

2. A gave B a power of attorney authorising him to draw cheques on A's banking account and apply the money for A's purposes. B fraudulently drew cheques on A's account, signing the cheques "A by B his attorney," and paid the cheques into his own banking account to meet an overdraft. B's bankers applied the cheques in reduction of the overdraft without making enquiries as to B's authority. Held, that B's bankers were bound by the terms of B's actual authority, which did not extend to paying B's debts with A's money (*l*) ; that they had converted the cheques ; and as, from the form of the cheques, they had notice that the money was not B's money, they were negligent in not making enquiry as to B's authority and therefore could not avail themselves of the protection of the Bills of Exchange Act, 1882 (*m*), s. 82, and were liable to A for the amount of the cheques (*n*).

3. An agent was intrusted by his principal with a document containing a written consent signed by the principal to do a particular act, but the agent was told not to give the consent, except on certain conditions which were not specified in the document. The agent consented unconditionally. Held, that the principal was bound, though he had signed the document without having read it (*o*). So, where A gave B a power of attorney to charge and transfer in any form whatever any estate, etc., "following A's letters of instructions and private advices which, if necessary," should "be considered part of these presents," it was held that A was bound by a mortgage on his property executed by B, although as between A and B the mortgage was not authorised (*p*). So, where a principal wrote—"I have authorised A to see you, and, if possible, to come to some amicable arrangement"—and gave

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(*i*) *Gloucester Bank* v. *Rudry, etc., Colly. Co.*, [1895] 1 Ch. 629 ; 64 L. J. Ch. 451, C. A. ; *Bargate* v. *Shortridge* (1855), 5 H. L. Cas. 297 ; 24 L. J. Ch. 457 ; *Re Land Credit Co.* (1869), L. R. 4 Ch. 460 ; 39 L. J. Ch. 27 ; *Duck* v. *Tower, etc., Co.*, [1901] 2 K. B. 314 ; 70 L. J. K. B. 625 ; *Montreal, etc., Co.* v. *Robert*, [1906] A. C. 196 ; 75 L. J. P. C. 33, P. C. ; *Dey* v. *Pullinger, etc., Co.*, [1921] 1 K. B. 77 ; 89 L. J. K. B. 1229.

(*k*) *Hambro* v. *Burnand*, [1904] 2 K. B. 10 ; 73 L. J. K. B. 669, C. A.

(*l*) *Midland Bank* v. *Reckitt*, [1933] A. C. 1 ; 102 L. J. K. B. 297, H. L. ; *Reckitt* v. *Barnett*, [1929] A. C. 176 ; 98 L. J. K. B. 136, H. L.

(*m*) 45 & 46 Vict. c. 61.

(*n*) *Midland Bank* v. *Reckitt, supra* ; and see Article 83.

(*o*) *Beaufort* v. *Neeld* (1845), 12 C. & F. 248, H. L.

(*p*) *Davy* v. *Waller* (1899), 81 L. T. 107.

A private instructions not to settle for less than a certain amount, it was held that he was bound by A's settlement for less than that amount, the instructions not having been communicated to the other party (*q*).

4. A gives B a signed form of promissory note or acceptance in blank, with authority on certain conditions to fill it up and convert it into a bill of exchange or promissory note for a certain amount. B fills it up in breach of the conditions and for a larger amount than was authorised, and negotiates it to C, who takes it in good faith and for value, without notice of the circumstances. A is liable to C on the bill or note as filled up (*r*). Otherwise, if C had had notice of the circumstances in which the document was issued (*s*), or if B had not been authorised to fill up or negotiate the instrument except on the receipt of instructions from A in that behalf (*t*).

5. A resident agent and manager of an unincorporated mining company orders goods which are necessary for working the mine. The shareholders are liable for the price, though the regulations of the company provide that all goods shall be purchased for cash, and no debt shall be incurred ; unless the person supplying the goods had notice that the agent was exceeding his authority (*u*).

6. An agent was employed as manager of a business, which he carried on apparently as principal. It was incidental to the ordinary course of the business to draw and accept bills of exchange, but it had been expressly agreed between the principal and agent that the agent should not draw or accept bills of exchange on the principal's behalf. The agent accepted a bill, in the name in which the business was carried on. Held, that the principal was liable on the bill (*a*). So, a horsedealer is bound by a warranty given by his agent for the sale of a horse (*b*), and a client by a compromise entered into by his solicitor (*c*), even if the warranty or compromise were contrary to express instructions, with respect to persons having no notice of such instructions.

7. An agent was given authority, in cases of emergency, to borrow money on exceptional terms outside the ordinary course of business. A third person, in good faith and without notice that the agent was exceeding his authority, lent money to him on such exceptional terms. Held, that the principal was bound, although in the particular case the emergency had not arisen (*d*).

8. An auctioneer is instructed to sell goods by auction, a reserve price being fixed. By mistake he sells without reserve. The principal is bound by the sale, subject to the provisions of the Sale of Goods Act, 1893 (*e*), s. 4 (*f*),

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(*q*) *Trickett* v. *Tomlinson* (1863), 13 C. B. (N.S.) 663.

(*r*) *Lloyds Bank* v. *Cooke*, [1907] 1 K. B. 794 ; 76 L. J. K. B. 666, C. A. ; *Montague* v. *Perkins* (1853), 22 L. J. C. P. 187 ; 45 & 46 Vict. c. 61, s. 20. Comp. *Baxendale* v. *Bennett* (1878), 3 Q. B. D. 525 ; 47 L. J. Q. B. 624, C. A. ; *Watkin* v. *Lamb* (1901), 85 L. T. 483.

(*s*) *Hatch* v. *Searles* (1854), 24 L. J. Ch. 22.

(*t*) *Smith* v. *Prosser*, [1907] 2 K. B. 735 ; 77 L. J. K. B. 71, C. A.

(*u*) *Hawken* v. *Bourne* (1841), 8 M. & W. 703 ; p. 55, *ante*.

(*a*) *Edmunds* v. *Bushell* (1865), L. R. 1 Q. B. 97 ; 35 L. J. Q. B. 20.

(*b*) *Howard* v. *Sheward* (1866), L. R. 2 C. P. 148 ; 36 L. J. C. P. 42.

(*c*) *Butler* v. *Knight* (1867), L. R. 2 Ex. 109 ; 36 L. J. Ex. 66 ; *Smith* v. *Troup* (1849), 7 C. B. 757 ; 18 L. J. C. P. 209 ; and see p. 63, *ante*.

(*d*) *Montaignac* v. *Shitta* (1890), 15 App. Cas. 357. See also *Bryant* v. *Quebec Bank*, [1893] A. C. 179 ; 62 L. J. P. C. 73, P. C.

(*e*) 56 & 57 Vict. c. 71.

(*f*) *Rainbow* v. *Howkins*, [1904] 2 K. B. 322 ; 73 L. J. K. B. 641.

unless the conditions of sale expressly provide that the lot is offered subject to a reserve price (*g*). Similarly, in the case of a sale of real property (*h*).

9. A solicitor is authorised to sue for a debt. A tender of the debt to his managing clerk operates as a tender to the client, although the clerk was instructed not to receive payment of the particular debt, unless at the time of the tender he disclaims any authority to receive the money (*i*).

10. A claims £50 from B for the use and occupation of certain premises, and authorises B to pay the amount to C. B calls on C and expresses his readiness to pay the amount, but C refuses to accept it, and claims a larger sum. There is a concluded agreement between A and B to settle the claim for £50, and A cannot maintain an action for a larger sum (*k*).

11. The manager of a business, which he carried on in his own name as apparent principal, ordered goods for the business. Held, that the undisclosed principal was liable for the price of the goods, although in ordering them the manager had exceeded his actual authority (*l*).

12. A broker was permitted by his principal, on several occasions, to draw bills in his own name for the price of goods sold on the principal's behalf. A purchaser accepted a bill so drawn, having previously paid in a similar manner for goods supplied to him. Held, that the principal was bound by the payment, although the broker became bankrupt before the maturity of the bill (*m*).

13. A, an iron-dealer, on one occasion sent B, a waterman, to buy iron on credit from C, and in due course paid C for it. On a subsequent occasion he sent him with ready money, but B again bought on credit and misappropriated the money. Held, that A was liable to C for the price of the iron bought on the second occasion, B apparently having authority to pledge his credit (*n*).

14. The assignee of a life policy which was voidable if the assured went beyond Europe, in paying the premiums to the local agent of the assurance company, told him that the assured was in Canada. The agent said that that would not avoid the policy, and continued to receive the premiums until the death of the assured. Held, that the company was estopped by the representation of its agent from saying that the policy was avoided by the absence of the assured (*o*). So, where a shipmaster signed a bill of lading containing

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(*g*) *McManus* v. *Fortescue*, [1907] 2 K. B. 1 ; 76 L. J. K. B. 393, C. A.

(*h*) *Fay* v. *Miller*, [1941] Ch. 360, C. A.

(*i*) *Moffatt* v. *Parsons* (1814), 1 Marsh. 55 ; *Bingham* v. *Allport* (1833), 2 L. J. K. B. 86 ; 1 N. & M. 398 ; *Kirton* v. *Braithwaite* (1836), 1 M. & W. 310 ; *Wilmot* v. *Smith* (1828), 3 C. & P. 453 ; *Goodland* v. *Blewitt* (1808), 1 Camp. 477 ; *Finch* v. *Boning* (1879), 4 C. P. D. 143 ; *Watson* v. *Hetherington* (1843), 1 C. & K. 36.

(*k*) *Gretton* v. *Mees* (1878), 7 Ch. D. 839 ; *Field* v. *Boland* (1837), 1 Dr. & Wal. 37.

(*l*) *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346. But see *Kinahan* v. *Parry*, [1911] 1 K. B. 459 ; 80 L. J. K. B. 276, C. A. See also Article 38.

(*m*) *Townsend* v. *Inglis* (1816), Holt 278 ; 17 R. R. 636 ; *Meyer* v. *Sze Hai Tong Banking, etc., Co.*, [1913] A. C. 847 ; 83 L. J. P. C. 103.

(*n*) *Hazard* v. *Treadwell* (1730), 1 Str. 506. Comp. *Barrett* v. *Irvine*, [1907] 2 Ir. R. 462, C. A.

(*o*) *Wing* v. *Harvey* (1854), 23 L. J. Ch. 511 ; 5 De G. M. & G. 265. See also *Mackie* v. *European Ass. Society* (1869), 21 L. T. 102 ; *Re Economic Fire Office* (1896), 12 T. L. R. 142 ; *London Freehold, etc., Co.* v. *Suffield*, [1897] 2 Ch. 608 ; 66 L. J. Q. B. 790, C. A. ; *Refuge Ass. Co.* v. *Kettlewell*, [1909] A. C. 243 ; 78 L. J. K. B. 519, H. L. Comp. *Re Hooley Hill Rubber, etc., Co.*, [1920] 1 K. B. 257 ; 89 L. J. K. B. 179, C. A.

a statement that the freight had been paid, it was held that the owners were estopped from claiming the freight from an indorsee for value of the bill of lading (*p*).

15. The directors of a company, having power to borrow such sums of money on the company's behalf as are authorised by resolution in general meeting, borrow £1,000 upon a bond under the seal of the company without the requisite resolution having been passed. The company is liable on the bond, unless the lender had notice of the irregularity (*q*).

Where the directors of a company had authority to delegate such of their powers as they thought fit to a managing director, it was held that the company was bound by the acts, within the scope of such powers, of a person who acted to their knowledge as managing director, though there was no other evidence that he had been duly appointed, or that the powers of the directors had been delegated to him, the person dealing with him having acted in good faith and without notice of any want of authority (*r*).

16. The directors of a company borrow money within the limits of their borrowing powers. The lender is under no obligation to inquire for what purposes the money is borrowed, and the company is bound by the contract of loan, though the money was borrowed and is applied for purposes which are *ultra vires*, unless the lender had notice of the improper nature of the transaction (*s*). If, by the articles of association, authority to borrow be restricted to the directors, the company can only be made liable for loans raised by the directors acting within their actual or apparent authority (*t*) ; but where the articles of a trading company empower the directors to borrow without restricting such power to the directors, the company may exercise its borrowing power through other duly authorised agents, and the acts of such agents, within the scope of their actual or apparent authority, will bind the company (*u*).

17. A, a solicitor, being intrusted with £4,000 to be lent on a mortgage, fraudulently retained £500, and told the mortgagor's solicitor that he was retaining it until a question as to the title was settled. A having become bankrupt, it was held that the mortgagor was entitled to redeem the property on payment of £3,500, with interest, though the mortgage deed acknowledged the receipt of £4,000, the retention of the £500 being within the apparent scope of A's authority (*a*).

18. A was in debt to a company for goods supplied by its branch at X, and also for goods supplied by its branch at Y. He entered into a deed of assignment for the benefit of his creditors. The company's agent at X branch assented to the deed, but its agent at Y branch refused to assent. The company

(*p*) *Howard* v. *Tucker* (1831), 1 B. & Ad. 712. See also *Compania Naviera Vascongada* v. *Churchill*, [1906] 1 K. B. 237 ; 75 L. J. K. B. 94.

(*q*) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327 ; 25 L. J. Q. B. 317, Ex. Ch. ; *Agar* v. *Athenæum Ass. Society* (1858), 27 L. J. C. P. 95 ; 3 C. B. (N.S.) 725.

(*r*) *Biggerstaff* v. *Rowatt's Wharf*, [1896] 2 Ch. 93 ; 65 L. J. Ch. 536, C. A. ; *British Thomson-Houston Co.* v. *Federated European Bank*, [1932] 2 K. B. 176 ; 101 L. J. K. B. 690, C. A.

(*s*) *Re Payne, Young* v. *Payne*, [1904] 2 Ch. 608 ; 73 L. J. Ch. 849, C. A.

(*t*) *Mahony* v. *East Holyford Mining Co.* (1875), L. R. 7 H. L. 869 ; *Re County Life Assurance Co.* (1870), L. R. 5 Ch. 288 ; 39 L. J. Ch. 471.

(*u*) *Mercantile Bank of India* v. *Chartered Bank of India*, [1937] 1 All E. R. 231.

(*a*) *Boyd* v. *Craster* (1864), 10 L. T. 480.

sued A for the debt incurred at Y branch. Held, that the company was bound by the assent given by its agent at X branch as to all debts due from A, and was precluded from maintaining the action (*b*).

## Article 82

### NOT BOUND BY ACTS BEYOND IMPLIED AUTHORITY

No principal is bound by any act of his agent which is not done within the agent's actual or implied authority (*c*), unless the principal in fact authorised the agent to do the particular act (*d*).

This article is subject to the provisions of Articles 85 to 88.

*Illustrations*

1. *Company Secretaries.*—The duties of a secretary are *prima facie* clerical and ministerial only, and it is not within the ordinary course of his employment to induce persons to take shares, nor to make any bargains or conditions as to taking shares (*e*). As regards certificates, he is authorised to deliver them, but he is not thereby held out as having authority to warrant their genuineness (*f*).

2. A agreed with a company to become surety for a debt owing by B, and indorsed a bill to the company for the amount, it being understood that he was to have funds to meet the bill out of a debt accruing due to B from C. The managing director of the company, who knew of this arrangement between A and B, had previously lent money privately to B, and held his acceptance. When the acceptance became due, the managing director obtained an order from B for the payment to him of the debt due from C, and appropriated this payment to his own private debt. In an action by the company against A on the bill indorsed by him as surety, it was held that the company was not responsible for the acts of the managing director in obtaining payment of his private debt, such acts not being within his authority (*g*).

3. The secretary of a company, who has authority to give acknowledgments and certificates in respect of share certificates lodged with the company, fraudulently certifies that certain certificates have been lodged, when in fact,

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(*b*) *Dunlop Rubber Co.* v. *Haigh*, [1937] 1 K. B. 347 ; 106 L. J. K. B. 166.

(*c*) Illustrations 2 and 3. And see *Tobin* v. *Crawford* (1842), 9 M. & W. 716 ; Ex. Ch., *Bank of Scotland* v. *Watson* (1813), 1 Dow. 40, H. L. ; *Rhodes* v. *Moules*, [1895] 1 Ch. 236 ; 64 L. J. Ch. 122, C. A.

(*d*) *Olding* v. *Smith* (1852), 16 Jur. 497 ; *Graves* v. *Masters* (1883), 1 C. & E. 73 ; *Fitzgerald* v. *Dressler* (1859), 29 L. J. C. P. 113 ; 7 C. B. (N.S.) 374 ; *Attwood* v. *Munnings* (1827), 7 B. & C. 278 ; *Att.-Gen.* v. *Jackson* (1846), 5 Hare 365 ; *Fenn* v. *Harrison* (1790), 3 T. R. 757 ; *Levy* v. *Richardson* (1889), 5 T. L. R. 236 ; *Kendal* v. *Wood* (1870), L. R. 6 Ex. 243 ; 39 L. J. Ex. 167, Ex. Ch. ; *Brettel* v. *Williams* (1849), 4 Ex. 623 ; 19 L. J. Ex. 121 ; *Sickens* v. *Irving* (1859), 29 L. J. C. P. 25 ; 7 C. B. (N.S.) 165 ; *Byrne* v. *Londonderry Tramway Co.*, [1902] 2 Ir. R. 457, C. A. See also Article 39, Illustration 6 ; Article 100, Illustrations 11 to 15 ; Article 102.

(*e*) *Newlands* v. *National Employers' Accident Association* (1885), 54 L. J. Q. B. 428, C. A. As to representations by promoters, see *Lynde* v. *Anglo-Italian Hemp Co.*, [1896] 1 Ch. 178 ; 65 L. J. Ch. 96, C. A.

(*f*) See Illustration 2.

(*g*) *McGowan* v. *Dyer* (1873), L. R. 8 Q. B. 141 ; *Watkin* v. *Lamb* (1901), 85 L. T. 483.

as he knows, the transfers were lodged without the certificates. The proposed transferee acts to his detriment on the faith of the certification. The company is not estopped from setting up the true facts, and showing that the proposed transferor had no shares to transfer (*h*). So, where the secretary of a company borrowed money for his own purposes on the security of a certificate, certifying that certain nominees of the lenders were registered as transferees of certain shares in the company, the certificate being in proper form and under seal, but the seal having been affixed fraudulently, and the signatures of the directors forged by the secretary, it was held that the company was not estopped from disputing the title of the lenders to the shares, nor responsible to them in any way for the fraudulent acts of the secretary (*i*).

4. The manager and director of the business, in South America, of a company, gave a promissory note in the name of the company. It was not shown that it was necessary, or in the ordinary course of business of such a company, when carried on in the usual way, to give promissory notes. Held, that the company was not bound by the note (*k*).

5. The local agent of an insurance company contracted on behalf of the company to grant a policy. Held, that it was not within the ordinary scope of the authority of such an agent to make such a contract, and that, therefore, the company was not bound by the contract, unless it could be shown that the agent was, in fact, authorised to make it (*l*). So, an insurance company is not bound by the acceptance of a premium by its agent after the time for payment of the premium has expired (*m*). And where a house or estate agent who is employed to procure a purchaser at a certain price enters into a contract of sale, the principal is not bound unless he in fact authorised the agent to make the contract on his behalf, because it is not within the ordinary scope of such an agent's authority to enter into binding contracts on his principal's behalf (*n*).

6. A stockbroker who was authorised to sell stock, sold it on credit, in good faith, for the benefit of the principal. Held, that the principal, not

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(*h*) *Whitechurch* v. *Cavanagh*, [1902] A. C. 117 ; 71 L. J. K. B. 400, H. L. ; *Kleinwort* v. *Associated Automatic Machine Corpn.* (1934), 151 L. T. 1, H. L. See also a discussion of this case and comments on the confusion of this branch of the law by C. A. Wright, 13 C. B. R. 116.

(*i*) *Ruben* v. *Great Fingall Consolidated*, [1906] A. C. 439 ; 75 L. J. K. B. 843, H. L. ; *South London Greyhound Racecourses* v. *Wake*, [1931] 1 Ch. 496 ; 100 L. J. Ch. 169. *Shaw* v. *Port Philip Mining Co.* (1884), 13 Q. B. D. 103 ; 15 L. J. Q. B. 369, is probably not law. Comp. *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396 ; 63 L. J. Q. B. 134, H. L. ; *Re Ottos Kopje Diamond Mines*, [1893] 1 Ch. 618 ; 62 L. J. Ch. 166 ; *Longman* v. *Bath Tramways*, [1905] 1 Ch. 646 ; 74 L. J. Ch. 424, C. A. ; *Dixon* v. *Kennaway*, [1900] 1 Ch. 833 ; 69 L. J. Ch. 501.

(*k*) *Re Cunningham, Simpson's claim* (1887), 36 Ch. D. 532 ; 57 L. J. Ch. 169.

(*l*) *Linford* v. *Provincial, etc. Ins. Co.* (1864), 34 Beav. 291. See also *Comerford* v. *Britannic Assurance Co.* (1908), 24 T. L. R. 593. Comp. *Holdsworth* v. *Lancs. and Yorks. Ins. Co.* (1907), 23 T. L. R. 521 ; *Refuge Ass. Co.* v. *Kettlewell*, [1909] A. C. 243 ; 78 L. J. K. B. 519 ; *Murfitt* v. *Royal Ins. Co.* (1922), 38 T. L. R. 334.

(*m*) *Acey* v. *Fernie* (1840), 7 M. & W. 151. See also *London and Lancs. Ass. Co.* v. *Fleming*, [1897] A. C. 499 ; 66 L. J. P. C. 116.

(*n*) *Chadburn* v. *Moore* (1892), 61 L. J. Ch. 674 ; *Hamer* v. *Sharp* (1874), L. R. 19 Eq. 108 ; 44 L. J. Ch. 53 ; *Prior* v. *Moore* (1887), 3 T. L. R. 624 ; *Thuman* v. *Best* (1907), 97 L. T. 239 ; *Lewcock* v. *Bromley* (1920), 37 T. L. R. 48. Comp. *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267 ; 69 L. J. Ch. 569 ; *Keen* v. *Mear*, [1920] 2 Ch. 574 ; 89 L. J. Ch. 513 ; *Allen* v. *Whiteman* (1920), 89 L. J. Ch. 534.

having expressly authorised a sale on credit, was not bound by the contract, because it is not usual to sell stock on such terms (*o*).

7. The manager of a public-house, who had authority to deal with particular persons only, bought spirits from a person with whom he had no authority to deal. Held, that the principal was not bound, it being usual for such managers to be restricted to particular persons from whom to purchase spirits (*p*).

8. A bank manager guarantees the payment of a certain draft. It is not within the ordinary scope of a bank manager's authority to give such a guarantee, and the bank therefore is not liable thereon unless he was expressly authorised to give it (*q*).

9. A gave authority to B, an insurance broker in Liverpool, to underwrite policies of marine insurance in his name, the risk not to exceed £100 by any one vessel. B underwrote a policy for £150 on A's behalf. The assured was not aware of the limitation on B's authority, but it was notorious in Liverpool that in nearly all such cases certain limits were fixed. Held, that A was not liable on the policy (*r*).

10. An insurance broker, being authorised to effect an insurance, agreed with a company for a policy on certain terms. The policy was duly executed by the company, and retained to await the application of the broker, who was debited with the amount of the premium. The broker, having been paid the premium by his principal, told the company that the insurance was a mistake, and fraudulently cancelled the policy without the principal's authority. Held, that the principal was entitled to enforce the contract as against the company, it not being part of a broker's ordinary authority to cancel contracts made by him (*s*).

11. A proposer for an insurance policy permitted an agent of the insurance company to invent the answers to questions which were intended to form the basis of the contract, and to send them to the company as answers of the proposer. Held, that in answering the questions the agent acted as the agent of the proposer and not of the company, and some of the answers being false, that the proposer could not claim under a policy granted by the company, though the proposer did not specifically authorise the agent to answer falsely, and did not know that he had done so (*t*).

12. A principal, who is in the habit of paying cash for goods bought by his agent, gives the agent money to buy goods. The agent buys the goods

(*o*) *Wiltshire* v. *Sims* (1808), 1 Camp. 258.

(*p*) *Daun* v. *Simmins* (1879), 41 L. T. 783, C. A. See also Article 38, *Kinahan* v. *Parry*, [1911] 1 K. B. 459 ; 80 L. J. K. B. 276, C. A. ; and compare *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346.

(*q*) *Re Southport Banking Co.* (1885), 1 T. L. R. 204. See also *Banbury* v. *Bank of Montreal*, [1918] A. C. 626 ; 87 L. J. K. B. 1158, H. L.

(*r*) *Baines* v. *Ewing* (1866), L. R. 1 Ex. 320 ; 35 L. J. Ex. 194.

(*s*) *Xenos* v. *Wickham* (1866), L. R. 2 H. L. 296 ; 36 L. J. C. P. 113, H. L.

(*t*) *Biggar* v. *Rock Life Ass. Co.*, [1902] 1 K. B. 516 ; 71 L. J. K. B. 79 ; *Life and Health Ass. Assn.* v. *Yule* (1904), 6 F. 437 ; *M'Millan* v. *Accident Ass. Co.*, [1907] S. C. 484 ; *Connors* v. *London and Provincial Ass. Co.* (1913), 47 Ir. L. T. 148 ; *Newsholme* v. *Road Transport Co.*, [1929] 2 K. B. 356 ; 98 L. J. K. B. 751, C. A. Cf. *Keeling* v. *Pearl Ass. Co.* (1923), 129 L. T. 573.

on credit and misappropriates the money. The principal is not liable for the price of the goods (*u*).

13. A partner, who is given authority to settle the affairs of the partnership on the winding-up thereof, draws a bill of exchange in the name of the firm. The other partners are not liable on the bill, unless they expressly authorised him to bind them by drawing bills (*a*).

14. The secretary of a company fraudulently, and without the knowledge of the directors, represented to A that if he took certain shares he would be appointed solicitor to the company, and subsequently that he had been so appointed. A, on the faith of the representations, applied for the shares, which were allotted to him. Held, that A was bound by the contract to take the shares, the representations being outside the scope of the secretary's employment (*b*). So, where the secretary of a tramway company made a representation as to the financial relations of the company, and it was not shown that he was authorised to make the representation, it was held that the company was not bound, it not being part of the ordinary duties of such secretary to make any representations on behalf of the company (*c*). But a principal is not entitled to retain the benefit of a contract induced by unauthorised misrepresentations of his agent ; and where premiums were paid on a policy on the faith of untrue statements by an agent of the insurance company, it was held that the company was liable to repay all the premiums paid after the making of the misrepresentations, though the agent had no authority to make them (*d*).

15. A company declared dividends which were not warranted by its financial condition. A law agent (who was also a member) of the company mentioned the dividends to A as proof of the flourishing condition of the company, and on the faith of his representations A purchased shares. Held, that A was bound by his contract to take the shares, it not being in the ordinary course of a law agent's employment to make representations as to the financial state of the company (*e*).

16. A steward, who was instructed to find a tenant for a vacant farm, but to consult with his principal before granting a lease, entered into an agreement to let the farm for twelve years, without consulting the principal. Held, that the principal was not bound by the agreement (*f*).

17. A principal cannot commit an act of bankruptcy by an unauthorised act of his agent, done without his knowledge (*g*).

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(*u*) *Stubbing* v. *Heintz* (1791), 1 Peake 66 ; *Rusby* v. *Scarlett* (1803), 5 Esp. 76 ; *Pearce* v. *Rogers* (1800), 3 Esp. 214.

(*a*) *Kilgour* v. *Finlyson* (1789), 1 H. Bl. 156 ; *Abel* v. *Sutton* (1800), 3 Esp. 108. Comp. *Smith* v. *Winter* (1838), 4 M. & W. 454 ; 8 L. J. Ex. 34.

(*b*) *Newlands* v. *National Employers' Accident Association* (1885), 54 L. J. Q. B. 428, C. A.

(*c*) *Barnett* v. *South London Tram Co.* (1887), 18 Q. B. D. 815 ; 56 L. J. Q. B. 452, C. A. ; *New Brunswick Ry.* v. *Conybeare* (1862), 9 H. L. Cas. 711 ; 31 L. J. Ch. 297, H. L. ; *Ex p. Frowd* (1861), 3 L. T. 843.

(*d*) *Refuge Ass. Co.* v. *Kettlewell*, [1909] A. C. 243 ; 78 L. J. K. B. 519, H. L. ; *Hughes* v. *Liverpool, etc., Socy.*, [1916] 2 K. B. 482 ; 85 L. J. K. B. 1643, C. A.

(*e*) *Burnes* v. *Pennell* (1849), 2 H. L. Cas. 497.

(*f*) *Collen* v. *Gardner* (1856), 21 Beav. 540.

(*g*) *Re Sawers, ex p. Blain* (1879), 12 Ch. D. 522, C. A.

## Article 83

### NO UNAUTHORISED ACT BINDING WITH RESPECT TO PERSONS WITH NOTICE

No act done by an agent in excess of his actual authority is binding on the principal with respect to persons having notice that in doing the act the agent is exceeding his authority (*h*).

Where the regulations of a company are registered, persons dealing with the directors and other agents of the company are for the purposes of this article deemed to have notice of such regulations (*i*).

A signature " per procuration " on a bill of exchange, promissory note, or cheque, operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority (*k*).

A third party dealing in good faith with an agent acting within his apparent authority is not prejudiced by the fact that the agent is acting for his own benefit and not the principal's (*l*), but the very nature of the transaction may be notice to the third party that the agent is exceeding his authority (*m*), *e.g.*, the form of cheques may be sufficient to put a banker on notice.

*Illustrations*

1. A broker in possession of goods upon which he has a lien for advances, pledges the goods for valuable consideration to a person who has notice that in so pledging them the broker is exceeding his authority. The transaction is not protected by the Factors Act, and the pledgee acquires no right to retain the goods as against the principal, even to the extent of the broker's lien, the lien not being transferable by such an unauthorised act (*n*).

2. A authorised his son to take delivery of a mare, provided that a certain warranty was given, and told the owner so. The son took away the mare without the warranty in question. Held, that the son's act did not amount to an acceptance of the mare, so as to bind the father (*o*).

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(*h*) See Illustrations. *Forman* v. *The Liddlesdale*, [1900] A. C. 190 ; 69 L. J. P. C. 44 ; *Russo-Chinese Bank* v. *Li Yau Sam*, [1910] A. C. 174 ; 79 L. J. P. C. 60 ; *Doey* v. *L. & N. W. Ry.*, [1919] 1 K. B. 623 ; 88 L. J. K. B. 737. See §§ 166, 167 of the American Restatement.

(*i*) Illustration 9.

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 25 ; *Midland Bank* v. *Reckitt*, [1933] A. C. 1 ; 102 L. J. K. B. 297, H. L. (Article 81, Illustration 2) ; *Alexander* v. *Mackenzie* (1848), 18 L. J. C. P. 94 ; 6 C. B. 766 ; *Attwood* v. *Munnings* (1827), 7 B. & C. 278 ; *Stagg* v. *Elliott* (1862), 31 L. J. C. P. 260 ; 12 C. B. (N.S.) 373 ; *Reid* v. *Rigby*, [1894] 2 Q. B. 40 ; 63 L. J. Q. B. 451 ; *Gompertz* v. *Cook* (1904), 20 T. L. R. 106 ; *Morison* v. *Kemp* (1912), 29 T. L. R. 70 ; Comp. *Bryant* v. *Quebec Bank*, [1893] A. C. 179 ; 62 L. J. P. C. 73, P. C. ; *Smith* v. *M'Guire* (1858), 3 H. & N. 554 ; 27 L. J. Ex. 465.

(*l*) *Lloyds Bank* v. *Chartered Bank of India*, [1929] 1 K. B. 40, 56.

(*m*) *John* v. *Dodwell*, [1918] A. C. 563. See also *Reckitt* v. *Barnett*, [1929] A. C. 176 ; *Midland Bank* v. *Reckitt*, [1933] A. C. 1.

(*n*) *M'Combie* v. *Davies* (1805), 7 East 5 ; *Daubigny* v. *Duval* (1794), 5 T. R. 604.

(*o*) *Jordan* v. *Norton* (1838), 4 M. & W. 155.

3. A paid money to a broker for a specific purpose. B, knowing that the money belonged to A, obtained it from the broker under pretence of a loan for a few days, and then claimed it for a debt due to him from the broker. Held, that B was liable to repay the amount to A (*p*). So, the transferee of a bank note acquires no title thereto if he take it with notice that the transfer is fraudulent (*q*).

4. An agent, purporting to act under a power of attorney, which he represented gave him full power to borrow, borrowed money from A, and misapplied it. The agent produced the power, which did not in fact authorise the loan, but A acted on his representation, and did not read the power. Held, that A must be taken to have had notice of the terms of the power, and that the principal was not bound by the loan (*r*).

5. A accepts a bill of exchange drawn by B, and delivers it to B to be held by him for A's use. B indorses the bill to C for a loan, having told C that it belongs to A, and that he (B) has no authority to deal with it. A is entitled to recover the bill or its value from C (*s*).

6. A consigns goods to B, who agrees to deal with the proceeds in a particular manner. B borrows money from C, a banker, and agrees that the proceeds of the goods shall be applied in repayment of the loan, C having notice of the agreement between A and B. The proceeds afterwards come to C's hands. C must apply them according to the agreement between A and B, and cannot retain them in repayment of the loan (*t*).

7. A indorses a bill of exchange "pay B or order for my use". B's bankers discount the bill and pay the proceeds to B's account. The bankers are liable to A for the amount, because the restrictive indorsement operated as notice that the bill did not belong to B (*u*). So, where A gave bills to his agent indorsed "on account of A", it was held that the agent could give no title to a pledgee, the indorsement operating as notice that he had no authority to pledge the bills (*a*).

8. The directors of a company instructed a broker to purchase, on behalf of the company, some of the company's own shares. The broker purchased and paid for the shares, and the company credited him with the amount. Held, that the transaction being *ultra vires* to the knowledge of the broker, the liquidator of the company was entitled to deduct the amount so credited from the debt for which the broker proved in the winding-up of the company (*b*).

9. The directors of a company enter into a contract which is beyond the scope of the authority given to them by the articles of association. The

(*p*) *Litt* v. *Martindale* (1856), 18 C. B. 314 ; *Muttyloll Seal* v. *Dent* (1853), 8 Moo. P. C. 319.
(*q*) *Solomons* v. *Bank of England* (1810), 13 East 135.
(*r*) *Jacobs* v. *Morris*, [1902] 1 Ch. 816 ; 71 L. J. Ch. 363, C. A.
(*s*) *Evans* v. *Kymer* (1830), 1 B. & Ad. 528.
(*t*) *Steele* v. *Stuart* (1866), 14 L. T. 620 ; *Thayer* v. *Lister* (1861), 30 L. J. Ch. 429. And see Article 111, Illustration 3.
(*u*) *Sigourney* v. *Lloyd*, *Lloyd* v. *Sigourney* (1828), 5 Bing. 525. And see *Watkin* v. *Lamb* (1901), 85 L. T. 483.
(*a*) *Treuttell* v. *Barandon* (1817), 1 Moo. 543.
(*b*) *Zulueta's Claim* (1870), L. R. 5 Ch. 444 ; 39 L. J. Ch. 598.

company is not bound by the contract (*c*). Otherwise if the contract had been within the scope of the authority of the directors, and they had merely omitted to observe the formalities required by the articles of association, the other contracting party not having notice of such omission (*d*).

## Article 84

AGENCY OF PARTNERS

Every partner is an agent of the firm and of his other partners, for the purpose of the business of the partnership ; and the acts of every partner, who does any act for carrying on in the usual way business of a kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner (*e*).

Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he be in fact specially authorised by the other partners, but this does not affect any personal liability incurred by an individual partner (*f*).

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of his firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act (*g*).

Everyone who, by words spoken or written, or by conduct, represents himself, or who knowingly suffers himself to be represented as a partner in a particular firm, is liable as a partner to anyone

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(*c*) *Balfour* v. *Ernest* (1859), 5 C. B. (N.S.) 601 ; 28 L. J. C. P. 170 ; *Re Arthur Average Assn.* (1876), 34 L. T. 942.

(*d*) See Article 81.

(*e*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 5. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement : s. 8. As to liability by holding out, see ss. 14, 36. As to liability of incoming and outgoing partners, see s. 17. As to execution of deeds, see Article 23.

(*f*) *Ibid.*, s. 7.

(*g*) *Ibid.*, s. 10. Where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it ; and where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm ; the firm is liable to make good the loss : s. 11. If a partner, being a trustee, improperly employs trust property in the business or on account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein, unless he has notice of the breach of trust ; but this does not prevent trust money from being followed and recovered from the firm if still in its possession or control : s. 13.

who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by, or with the knowledge of, the apparent partner making the representation or suffering it to be made (*h*). Provided that where after a partner's death the partnership business is continued in the old firm's name, the continued use of that name or of the deceased partner's name as part thereof does not of itself make his executors, or administrators, estate, or effects, liable for any partnership debts contracted after his death (*i*).

The liability of partners *ex contractu* is joint, but the estate of a deceased partner is severally liable for debts and obligations unsatisfied, subject to prior payment of his separate debts (*k*). Liability *ex delicto* is joint and several (*l*).

An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of business, is evidence against the firm (*m*) ; and notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the cause of a fraud on the firm committed by or with the consent of that partner (*n*).

*Trading Partnerships*

In the case of trading partnerships (*o*), a partner has implied authority, for the purpose of the partnership business, to pledge or sell the partnership property, buy goods, contract and pay debts, and draw, make, sign, indorse, accept, transfer, negotiate and procure to be discounted, promissory notes, bills of exchange, cheques and other negotiable paper (*p*) ; but not to issue acceptances in blank (*q*). He may also make an equitable mortgage of partnership property (*r*).

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(*h*) A partner who has retired does not knowingly suffer himself to be represented as a partner if the partner in the new firm wrongly uses notepaper bearing the name of the retiring partner : *Tower Cabinet Co.* v. *Ingram*, [1949] 2 K. B. 397.

(*i*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 14. Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm, until he has notice of the change : s. 36. Advertisement in the London Gazette is notice to persons who had not dealings with the firm before the change : *ibid.*

(*k*) See *ibid.*, s. 9.

(*l*) See *ibid.*, s. 12.

(*m*) *Ibid.*, s. 15.

(*n*) *Ibid.*, s. 16.

(*o*) Firms of solicitors (*Hedley* v. *Bainbridge* (1842), 2 Q. B. 316 ; 11 L. J. Q. B. 293), brokers (*Yates* v. *Dalton* (1858), 28 L. J. Ex. 69), auctioneers (*Wheatley* v. *Smithers*, [1906] 2 K. B. 321 ; 75 L. J. K. B. 627 ; on appeal ([1907] 2 K. B. 684) the C. A. expressed no opinion upon the point) or cinematograph theatre proprietors (*Higgins* v. *Beauchamp*, [1914] 2 K. B. 1192 ; 84 L. J. K. B. 631) are not within the category.

(*p*) *Bank of Australia* v. *Breillat* (1847), 6 Moo. P. C. 152, 194 ; 12 Jur. 189 ; *Butchart* v. *Dresser* (1853), 4 De G. M. & G. 542 ; 10 Hare 453.

(*q*) *Hogarth* v. *Latham* (1878), 3 Q. B. D. 643 ; 47 L. J. Q. B. 339. This would not affect a holder in due course.

(*r*) *Re Bourne*, [1906] 2 Ch. 427 ; 75 L. J. Ch. 779, C. A. ; *Re Clough* (1885), 55 L. J. Ch. 77 ; 31 Ch. D. 324.

## Article 85

### DISPOSITIONS BY AGENTS INTRUSTED WITH APPARENT OWNERSHIP OR TITLE-DEEDS OF PROPERTY

Where a principal, by words or conduct, represents, or permits it to be represented, that his agent is the owner of any property, any sale, pledge, mortgage, or other disposition for value of the property by the agent is as valid against the principal as if the agent were the owner thereof, with respect to any person dealing with him on the faith of such representation (*s*).

Where a principal intrusts his agent with the possession of the title-deeds of any property, and authorises him to raise money on the security thereof, any security given by the agent on the property for money advanced, though for a larger amount than he was authorised to raise, is valid against the principal, provided that the person taking the security acts in good faith, and without notice that the agent has not authority to give the security (*t*).

Where a mortgagee of property permits the mortgagor to have possession of the title-deeds for the purpose of giving a security on the property, any security for value given by the mortgagor thereon has priority to the claim of the mortgagee, provided that the person taking the security acts in good faith, and without notice of the mortgage (*u*).

Provided always that no right or title can be acquired under or by means of any forged instrument (*x*).

*Illustrations*

1. A, through the agency of B, a broker, obtained a loan on a mortgage of stock, and afterwards permitted the security to be transferred to B's banker, who had no notice of A's title and believed that B was the owner of the stock. B sold the stock, which was transferred by the banker to the purchaser, and, having paid off the loan, converted the balance to his own use. Held, that A had no remedy against the banker (*a*).

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(*s*) Illustrations 1 and 2. And see cases cited in note (*u*) below. Comp. *Farquharson* v. *King*, [1902] A. C. 325 ; 71 L. J. K. B. 667, H. L.

(*t*) Illustration 3. See also *Gordon* v. *James* (1885), 30 Ch. D. 249, C. A. ; *King* v. *Smith*, [1900] 2 Ch. 425 ; 69 L. J. Ch. 598 ; *London Freehold, etc., Co.* v. *Suffield*, [1897] 2 Ch. 608 ; 66 L. J. Ch. 790, C. A. ; *Hooper* v. *Herts*, [1906] 1 Ch. 549 ; 75 L. J. Ch. 253, C. A. ; *Powell* v. *Browne* (1908), 97 L. T. 854, C. A.

(*u*) *Perry-Herrick* v. *Atwood* (1857), 2 De G. & J. 21 ; *Briggs* v. *Jones* (1870), L. R. 10 Eq. 92 ; *Clarke* v. *Palmer* (1882), 21 Ch. D. 124 ; 51 L. J. Ch. 634. Comp. *Colyer* v. *Finch* (1856), 5 H. L. Cas. 905 ; 26 L. J. Ch. 65, H. L. ; *Northern Counties Ins. Co.* v. *Whipp* (1884), 26 Ch. D. 482 ; 53 L. J. Ch. 629, C. A. ; *Hunt* v. *Elmes* (1861), 30 L. J. Ch. 255 ; *Cottey* v. *Nat. Prov. Bank* (1904), 20 T. L. R. 607.

(*x*) Illustrations 4 and 5. *Esdaile* v. *La Nauze* (1835), 1 Y. & C. 394 ; 4 L. J. Ex. Eq. 46. Article 82, Illustration 3.

(*a*) *Marshall* v. *Nat. Prov. Bank* (1892), 61 L. J. Ch. 465 ; *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120 ; 62 L. J. Ch. 358. See also *Fuller* v. *Glyn*, [1914] 2 K. B. 168 ; 83 L. J. K. B. 764. Comp. *Jameson* v. *Union Bank of Scotland* (1913), 109 L. T. 850.

2. A broker, having effected an insurance policy in his own name, was permitted to retain possession thereof for the purpose of receiving the proceeds. The broker pledged the policy. Held, that the pledgee was entitled, as against the principal, to retain the advance out of the proceeds of the policy (*b*).

3. An owner of certain deeds intrusts them to an agent, with authority to pledge them for a certain sum. The agent pledges them for a larger sum to a person who takes them in good faith, and without notice of the limit on the agent's authority. The owner is not entitled to recover the deeds, except on repayment of the full amount advanced upon them (*c*).

4. A solicitor is employed to obtain a loan of £100 on a mortgage of certain property, and is intrusted with the title-deeds for that purpose. He forges the client's signature to a mortgage deed for £400, and misappropriates the whole sum. The mortgage is void, and the client is not liable to the mortgagee, even to the extent of £100 (*d*).

5. A corporation negligently allows its secretary to have the custody of its common seal. The secretary affixes the seal to a forged power of attorney, under which stock belonging to the corporation is transferred. The corporation is not bound by the transfer (*e*).

## Article 86

### DEALINGS WITH MONEY AND NEGOTIABLE SECURITIES

Where an agent, in consideration of an antecedent debt or liability, or for any other valuable consideration, pays or negotiates money or negotiable securities in his possession to a person who receives the same in good faith and without notice that the agent has not authority so to pay or negotiate the same, the payment or negotiation is as valid as if it had been expressly authorised by the owner of the money or securities.

A thing is deemed to be done in good faith within the meaning of this article when it is in fact done honestly, whether it is done negligently or not (*f*).

*Illustrations*

1. A, having bought on the Stock Exchange scrip which was issued in England by the agent of a foreign government, and which purported to entitle

(*b*) *Callow* v. *Kelson* (1862), 10 W. R. 193.

(*c*) *Brocklesby* v. *Temperance Building Society*, [1895] A. C. 173 ; 64 L. J. Ch. 433, H. L. ; *Tottenham* v. *Green* (1863), 1 N. R. 466 ; *Robinson* v. *Montgomery Brewery*, [1896] 2 Ch. 841 ; *Rimmer* v. *Webster*, [1902] 2 Ch. 163 ; 71 L. J. Ch. 561 ; *Fry* v. *Smellie*, [1912] 3 K. B. 282 ; 81 L. J. K. B. 1003, C. A. ; *Abigail* v. *Lapin*, [1934] A. C. 491 ; 103 L. J. P. C. 105, P. C.

(*d*) *Painter* v. *Abil* (1863), 33 L. J. Ex. 60 ; 2 H. & C. 113 ; *Fox* v. *Hawks* (1879), 13 Ch. D. 822 ; 49 L. J. Ch. 579.

(*e*) *Bank of Ireland* v. *Evans' Trustees* (1855), 5 H. L. Cas. 389 ; 101 R. R. 218 ; *Merchants of Staple* v. *Bank of England* (1888), 21 Q. B. D. 160 ; 57 L.J. Q. B. 418, C. A. ; *Lewes Laundry Co.* v. *Barclay* (1906), 22 T. L. R. 737. And see Article 82, Illustration 3.

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 90 ; *Goodman* v. *Harvey* (1836), 4 A. & E. 870 ; *Raphael* v. *Bank of England* (1855), 25 L. J. C. P. 33 ; 17 C. B. 161 ; *Jones* v. *Gordon* (1877), 2 App. Cas. 616, H. L. Illustration 2. As to notice see Article 83.

the bearer, on payment of £100, to receive a bond for that amount, intrusted the scrip to a broker. The broker pledged the scrip as security for a debt owing by himself, the pledgee taking it in good faith and without notice that the broker was not authorised so to pledge it. Held, that the scrip being negotiable in the same manner as the bond which it represented would be, the pledgee acquired a good title, as against A, to the extent of the pledge (*g*).

2. A broker fraudulently pledged with a banker negotiable securities belonging to various principals, as security for an advance. The banker acted in good faith, but had no knowledge whether the securities were the property of the broker, or whether he had authority to pledge them, or not, and made no inquiries. Held, that the banker had a good title to the securities, as against the principals, to the extent of the advance (*h*). Every person who takes negotiable securities for valuable consideration, and in good faith, acquires a good title, although the person who negotiates them has no authority to do so (*h*).

3. An auctioneer, in the ordinary course of business, and not in breach of trust, paid the proceeds of sales into his own account at a bank. The bankers retained the amounts so paid in for an overdraft of the auctioneer, and closed the account. Held, that the principal had no remedy against the bankers, although they had notice that the money was substantially the proceeds of sales. Otherwise, if the auctioneer had been guilty of a breach of trust in so paying in the money, and the bankers had been aware of that (*i*). So, a banker is entitled to set off what is due to a customer on one account against what is due from him on another, though the money so set off be trust money, provided that the banker has no notice of the trust (*k*).

## Article 87

### SALES IN MARKET OVERT

Where an agent sells goods in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided that he buys them in good faith and without notice of any want of authority on the part of the agent (*l*).

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(*g*) *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476 ; 45 L. J. Ex. 748, H. L. ; *Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194 ; 46 L. J. Q. B. 346 ; *Wookey* v. *Pole* (1820), 4 B. & A. 1 ; *Edelstein* v. *Schuler*, [1902] 2 K. B. 144 ; 71 L. J. K. B. 572 ; *Bechuanaland, etc., Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658 ; 67 L. J. Q. B. 986.

(*h*) *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201 ; 61 L. J. Ch. 723, H. L. ; *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120 ; 62 L. J. Ch. 358 ; *Mutton* v. *Peat*, [1900] 2 Ch. 79 ; 69 L. J. Ch. 484, C. A. ; *Lloyds Bank* v. *Swiss Bankverein* (1913), 108 L. T. 143, C. A. Comp. *Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333 ; 57 L. J. Ch. 986, H. L.

(*i*) *Marten* v. *Rocke* (1885), 53 L. T. 946 ; *Thomson* v. *Clydesdale Bank*, [1893] A. C. 282 ; 62 L. J. P. C. 91, H. L. Sc. ; *Shields* v. *Bank of Ireland*, [1901] 1 Ir. R. 222. And see Article 111, Illustration 3 ; Article 137.

(*k*) *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A. C. 693, P. C. ; *Bank of New South Wales* v. *Goulburn Valley Butter Factory*, [1902] A. C. 543 ; 71 L. J. P. C. 112.

(*l*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 22 (1).

## Article 88

DISPOSITIONS PROTECTED BY THE FACTORS ACT, 1889 (*m*)

Where a mercantile agent (*n*) is, with the consent of the owner (*o*), in possession (*p*) of goods (*q*), or of the documents of title (*r*) to goods, any sale, pledge (*s*), or other disposition (*t*) of the goods made by him when acting in the ordinary course of business of a mercantile agent (*u*) is as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the person taking under the disposition acts in good faith, and has not, at the time of the disposition, notice that the agent has not authority to make the same (*a*).

Provided further that—

(a) where the goods are pledged, without authority, for an antecedent debt or liability of the pledgor, the pledgee acquires no further right to the goods than could have been enforced by the pledgor at the time of the pledge (*b*) ;

(b) the consideration for the disposition may be any valuable consideration, but where the goods are pledged, without authority, in consideration of the delivery or transfer of other goods or documents of title to goods, or of a negotiable security, the pledgee acquires no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange (*c*).

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(*m*) 52 & 53 Vict. c. 45.

(*n*) For definition of mercantile agent, see s. 1 (1) ; Article 2.

(*o*) Presumed in the absence of evidence to the contrary : s. 2 (4).

(*p*) A person is deemed to be in possession of the goods or documents when they are in his actual custody, or are held by any other person subject to his control, or for him, or on his behalf : s. 1 (2). The possession must be that of a mercantile agent, as such : *Staffs Motor Guarantee* v. *British Wagon Co.*, [1934] 2 K. B. 305 ; 103 L. J. K. B. 613.

(*q*) The expression " goods " includes wares and merchandise : s. 1 (3). It does not include certificates of stock : *Freeman* v. *Appleyard* (1862), 32 L. J. Ex. 175 ; 1 N. R. 30.

(*r*) The expression " documents of title " includes any bill of lading, dock warrant, warehouse keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising, or purporting to authorise, either by indorsement or delivery, the possessor of the document to transfer or receive goods thereby represented : s. 1 (4). A motor vehicle registration book is not a document of title : *Joblin* v. *Watkins & Roseveare Motors Ltd.*, 64 T. L. R. 464 ; [1949] 1 All. E. R. 47.

(*s*) " Pledge " includes any contract pledging or giving a lien or security on goods, whether in consideration of an original advance, or of any further or continuing advance, or of any pecuniary liability : s. 1 (5). See *Jewan* v. *Whitworth* (1866), L. R. 2 Eq. 692 ; 36 L. J. Ch. 127 ; *Sheppard* v. *Union Bank* (1862), 31 L. J. Ex. 154 ; 7 H. & N. 661.

(*t*) Entrusting goods to an auctioneer for sale is not a pledge or other disposition within the meaning of the Act, though the auctioneer make advances on the goods : *Waddington* v. *Neale* (1907), 96 L. T. 786.

(*u*) See note to this Article, p. 190, *post*.

(*a*) S. 2 (1).

(*b*) S. 4 ; Illustration 1.

(*c*) S. 5.

For the purposes of this article—

(a) a pledge of the documents of title to goods is deemed to be a pledge of the goods (*d*) ;

(b) a person is not deemed to act in good faith and without notice if the circumstances of the particular case are such as would lead a reasonable business man to believe that the agent is exceeding his authority or acting in bad faith (*e*) ;

(c) in the case of a disposition to two or more persons who are acting in the transaction as partners, want of good faith on the part of any one of them will deprive them all of the protection of the statute (*f*).

This article applies only to mercantile agents (*g*).

*Possession with Consent of the Owner*

Where the agent has, with consent, been in possession of the goods or documents, a disposition which would have been valid if the consent had continued, is valid notwithstanding determination of the consent, if the person taking under the disposition had not, at the time thereof, notice that the consent has been determined. Where the agent has obtained possession of documents of title through being, or having been, with such consent, in possession of the goods or of other documents of title to them, his possession of the former documents is deemed to be with such consent (*h*).

Where the owner consents to possession by the agent, the operation of the Act is not defeated by the fact that consent was obtained by fraud ; and the agent may give a good title to a buyer or pledgee, although the agent obtained the goods by false pretences (*i*), or through larceny by a bailee, but not, it would seem, if he obtains the goods by what amounts to larceny by a trick, although the position is not clear as the authorities are conflicting (*k*). But where the owner is induced to part with possession by fraudulent misrepresentation as to the identity of the person with whom he is dealing (if such identity be material), there is no real consent to the transfer of possession (*l*).

*Ordinary Course of Business*

An agreement made with a mercantile agent through a clerk, or other person authorised in the ordinary course of business to make contracts, is

(*d*) S. 3 ; Illustration 1. The transfer of a document may be by indorsement, or, where the document is, by custom or by its express terms, transferable by delivery, or makes the goods deliverable to the bearer, then by delivery : s. 11.

(*e*) *Gobind Chunder Sein* v. *Ryan* (1861), 9 Moo. Ind. App. 140, P. C. ; *Navulshaw* v. *Brownrigg* (1852), 2 De G. M. & G. 441 ; 21 L. J. Ch. 908 ; *Douglas* v. *Ewing* (1857), 6 Ir. C. L. R. 395, Ir. ; *Learoyd* v. *Robinson* (1844), 13 L. J. Ex. 213 ; 12 M. & W. 745 ; *Mehta* v. *Sutton* (1913), 109 L. T. 529, C. A.

(*f*) *Oppenheimer* v. *Frazer*, [1907] 2 K. B. 50 ; 76 L. J. K. B. 806, C. A.

(*g*) Illustrations 5 to 7. *Lewis* v. *Ramsdale* (1886), 55 L. T. 179 ; *Inglis* v. *Robertson*, [1898] A. C. 616 ; 67 L. J. P. C. 108, H. L. Sc.

(*h*) See s. 2 (2). As to notice, see Article 83.

(*i*) *Whitehorn Brothers* v. *Davison*, [1911] 1 K. B. 463, C. A.

(*k*) *Folkes* v. *King*, [1923] 1 K. B. 282 ; 92 L. J. K. B. 125, C. A. Comp. *Oppenheimer* v. *Frazer*, [1907] 2 K. B. 50 ; 76 L. J. K. B. 806, C. A. See *London Jewellers* v. *Attenborough*, [1934] 2 K. B. 206 ; 103 L. J. K. B. 429, C. A.

(*l*) *Lake* v. *Simmons*, [1927] A. C. 487, H. L. ; and see *Heap* v. *Motorists' Advisory Agency*, [1923] 1 K. B. 577, 585.

deemed to be an agreement with the agent. The Act is in amplification and not in derogation of other powers of an agent. But nothing therein authorises an agent to exceed his authority, as between him and his principal ; or prevents the owner from recovering goods from an agent or his trustee in bankruptcy before a sale or pledge ; or from redeeming pledged goods, before sale, on satisfying the claim for which they were pledged and paying to the agent, if required, money in respect of which he would have a lien ; or from recovering from a pledgee any balance in his hands, as the produce of sale, after deducting the amount of his lien (*m*).

It is not necessary that the pledge or other disposition should be in the ordinary course of business of the particular mercantile agent, and evidence of a custom of a particular trade excluding authority to pledge goods intrusted to a mercantile agent in that trade is not admissible for the purpose of limiting the protection given by the Act (*n*). A diamond broker may be acting in the ordinary course of business of a mercantile agent within the meaning of the Act, in pledging diamonds intrusted to him for sale, although by the custom of the trade such a broker has no authority to pledge diamonds so intrusted to him (*n*). And a pledge of diamonds or jewellery to a pawnbroker or money-lender is not necessarily outside the ordinary course of business because the loan may carry 20 or 30 per cent. interest (*o*). The charging of a high rate of interest is only material as evidence that the pledgee did not act in good faith, or that he had notice that the agent had no authority to make the pledge (*p*). It is not, however, in the ordinary course of business for an agent to ask a friend to pawn goods intrusted to him. In order that a pledge may be protected, the agent must pledge the goods himself or by a servant or agent employed in the ordinary course of business (*q*).

*Illustrations*

1. A broker is authorised to sell goods, and is intrusted with the bill of lading for them by the owner thereof. By means of the bill of lading he obtains dock warrants for the goods, and without the authority of the principal, pledges the warrants with his banker as security for an overdraft, the banker taking them in good faith, and without notice that in so pledging them he is exceeding his authority. Before receiving notice of the want of authority, the banker, on the faith of the pledge, permits the overdraft to be increased. So far as concerns the overdraft existing at the time of the pledge, the principal is only bound by the pledge to the extent of any lien the broker had on the goods at that time, and may redeem the goods upon payment to that extent, and payment of the amount overdrawn since the date of the pledge. If the broker has a lien in excess of the full amount of the overdraft, the principal

(*m*) See ss. 6, 12, 13.

(*n*) *Oppenheimer* v. *Attenborough*, [1908] 1 K. B. 221 ; 77 L. J. K. B. 209, C. A.

(*o*) *Oppenheimer* v. *Attenborough*, *supra* ; *Weiner* v. *Harris*, [1910] 1 K. B. 285, (overruling *Hastings* v. *Pearson*, [1893] 1 Q. B. 62 ; where it was held that a pledge with a pawnbroker by an agent intrusted with jewellery for sale was not protected by the Act). It is not within the scope of this work to discuss the soundness of these decisions, both of which were unanimous, though they are obviously open to criticism.

(*p*) *Janesich* v. *Attenborough* (1910), 102 L. T. 605.

(*q*) S. 6 ; *De Gorter* v. *Attenborough* (1905), 21 T. L. R. 19 ; *Folkes* v. *King*, [1923] 1 K. B. 282 ; 92 L. J. K. B. 125, C. A. In *Biggs* v. *Evans*, [1894] 1 Q. B. 88, it was held that a sale by a mercantile agent was not in the ordinary course of business because of the unusual mode of payment. See Appendix.

must, if required, also pay to the broker the amount of the excess before he is entitled to redeem the goods (*r*).

2. A factor is intrusted with the possession of goods for sale. The principal revokes his authority, and demands the return of the goods. The factor refuses to return the goods, and then fraudulently sells and delivers them to a person who purchases them in good faith, and without notice that the factor has not authority to sell them, or that he is in possession of the goods without the consent of the owner. The principal is bound by the sale, but may sue in his own name for the price, subject to any right of set-off the purchaser may have against the factor (*s*). The factor is civilly and criminally liable for the fraudulent breach of duty to the same extent as he would have been if the Factors Act had not been passed (*t*).

3. A factor in possession of goods with the consent of the owner pledges them with A for an advance. Subsequently, the factor, with the consent of A, obtains an advance from B upon the security of the same goods. The principal is bound by both advances, provided that A and B acted in good faith, and without notice that the factor had not authority to so act (*u*). So, if the advances be made to a third person at the request of the factor (*a*).

4. A home agent employed by a foreign principal to negotiate sales in London obtains an offer from A, which the principal accepts. The principal specially indorses to A the bill of lading for the goods, and sends it to the agent to be exchanged for A's acceptance. The agent, without the principal's authority, agrees with A to cancel the contract, and subsequently induces him to indorse the bill of lading by representing that it was specially indorsed by mistake, and then, having obtained possession of the goods by means of the bill of lading, pledges them for an advance. The pledge is not protected by the Factors Act, because the agent did not obtain possession of the goods with consent of the principal. The principal, therefore, is entitled to recover the goods from the pledgee (*b*).

5. An agent occupies a furnished house, and has the control of the furniture therein, with the consent of the owner of the furniture. A third person makes advances on the security of the furniture, believing the agent to be the owner thereof. The transaction is not protected by the Factors Act (*c*).

6. A wine merchant's clerk, permitted to have the possession for the purpose of his master's business of dock warrants for wine belonging to his master, fraudulently pledges the warrants for an advance to himself. The transaction is not protected by the Factors Act, because the clerk is not a mercantile agent within the meaning of the Act (*d*).

7. A, a manufacturing jeweller, supplies jewellery to B, a retail jeweller, on sale or return, on the terms that it is to remain the property of A until it

(*r*) S. 12 (2).
(*s*) S. 12 (3). See *Moody* v. *Pall Mall, etc., Co.* (1917), 33 T. L. R. 306.
(*t*) S. 12 (1).
(*u*) *Portalis* v. *Tetley* (1867), L. R. 5 Eq. 140 ; 37 L. J. Ch. 139.
(*a*) *Sheppard* v. *Union Bank* (1862), 7 H. & N. 661 ; 31 L. J. Ex. 154.
(*b*) *Vaughan* v. *Moffatt* (1868), 38 L. J. Ch. 144.
(*c*) *Wood* v. *Rowcliffe* (1846), 6 Hare 191.
(*d*) *Lamb* v. *Attenborough* (1862), 31 L. J. Q. B. 41 ; 1 B. & S. 831. See also *Farquharson* v. *King*, [1902] A. C. 325 ; 71 L. J. K. B. 667, H. L.

is sold or paid for, B, after selling it, to retain half the difference between the cost price and selling price, by way of remuneration, and to remit the balance of the proceeds to A. B is merely A's agent for sale, and therefore a mercantile agent within the meaning of the Act (*e*).

8. A company pledged bills of lading with A, a bank, as security for bills of exchange or advances. A handed the bills of lading back to the company upon terms contained in trust receipts, whereby the company was authorised to sell the goods and undertook to hold the proceeds in trust for A. The company pledged the bills of lading with B, a bank, to secure advances. B acted in good faith and without notice that the company was not entitled so to pledge the bills of lading. A claimed the bills of lading from B. Held, that A was owner of the goods represented by the bills of lading, within the meaning of the Factors Act ; but that the company was a mercantile agent in possession of the bills of lading within the meaning of the Act and that the pledge to B was valid (*f*).

## Article 89

LIEN OF CONSIGNEE FOR ADVANCES TO APPARENT OWNER OF GOODS

Where the owner of goods has given possession thereof to an agent for the purpose of consignment or sale, or has shipped goods in the name of an agent, and the consignee of the goods has not had notice that the agent is not the owner thereof, the consignee in respect of advances made to or for the use of the agent, has the same lien on the goods as if the agent were the owner thereof, and may transfer any such lien to another person ; provided that nothing in this article limits or affects the validity of any sale, pledge, or other disposition by a mercantile agent (*g*).

## Article 90

The Crown may sue, or may be sued without a petition of right, on any contract duly made on its behalf by a public agent (*h*).

*Crown Proceedings Act*, 1947 (*i*)

Where a subject could have proceeded by petition of right before the commencement of this Act (*k*), he may after that date proceed without obtaining the fiat of the Crown (*l*). The Act does not substantially alter the law as to contracts with the Crown, but it changes the procedure.

(*e*) *Weiner* v. *Harris*, [1910] 1 K. B. 285 ; 79 L. J. K. B. 342, C. A.
(*f*) *Lloyds Bank* v. *Bank of America National Trust and Savings Association*, [1938] 2 K. B. 147 ; 107 L. J. K. B. 538, C. A.
(*g*) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 7. See Article 88.
(*h*) See Articles 1 and 115.
(*i*) 10 & 11 Geo. 6, c. 44.
(*k*) January 1, 1948.
(*l*) S. 1. The Treasury has published a list of Government departments which are authorised departments for the purposes of the Act, and the name and address of the person to be served.

## Article 91

PRINCIPAL MAY SUE OR BE SUED IN HIS OWN NAME

Every principal, whether disclosed or undisclosed, may sue or be sued in his own name on any contract duly made on his behalf (*m*) and in respect of any money paid or received by his agent on his behalf (*n*). Provided always that the right of the principal to sue, and his liability to be sued, on a contract made by his agent, may be excluded by the terms of the contract (*o*).

Where an agent enters into a contract, oral or written, in his own name, parol evidence is admissible to show who is the real principal, in order to charge him or entitle him to sue on the contract (*p*), provided that such evidence is not inconsistent with the terms of a written contract (*q*).

The right and liability of a principal, whether disclosed or undisclosed, to sue and be sued in his own name on a contract made on his behalf, are not affected by the circumstances that the contract is to be partly performed by the agent and that from the terms thereof the consideration appears to move from the agent alone (*r*) ; nor by the circumstance that the agent was acting as a *del credere* agent (*s*).

This article, so far as concerns undisclosed principals, does not apply to foreign principals, nor to deeds, bills of exchange, promissory notes, or cheques (*t*).

*Illustrations*

1. A factor, acting on behalf of his principal, sells goods in his own name. The principal may sue for the price (*u*). But if an agent sell goods in his own name to a person who believes him to be the principal and who contracts with him for a reason personal to the agent, *e.g.*, that the agent is the debtor of such person, the principal cannot sue upon the contract of sale (*a*).

2. A wife, who carried on a business on behalf of her husband upon premises of which she was tenant and in respect of which she paid the rates,

(*m*) Illustrations 1 to 5. *Browning* v. *Provincial Ins. Co.* (1873), L. R. 5 P. C. 263, P. C. ; *Bell* v. *Plumbly* (1900), 16 T. L. R. 393. Article 96, Illustrations 5 to 7. See as to disclosed principals, §§ 292 to 294 and also 295 to 301 of the American Restatement and as to undisclosed principals, §§ 302 to 310.

(*n*) Illustrations 6 to 8. *Evans* v. *Collins* (1844), 5 Q. B. 804.

(*o*) Illustration 10. *M'Auliffe* v. *Bicknell* (1835), 2 C. M. & R. 263 ; *Collins* v. *Associated Greyhound Racecourses*, [1930] 1 Ch. 1 ; 99 L. J. Ch. 52, C. A.

(*p*) Illustration 11. *Morris* v. *Wilson* (1859), 5 Jur. (N.S.) 168 ; *Calder* v. *Dobell* (1871), L. R. 6 C. P. 486 ; 40 L. J. C. P. 224 ; *Wilson* v. *Hart* (1817), 1 Moore 45 ; *Weidner* v. *Hoggett* (1876), 1 C. P. D. 533 ; *Trueman* v. *Loder* (1840), 11 A. & E. 589.

(*q*) Illustration 12.

(*r*) *Phelps* v. *Prothero* (1855), 24 L. J. C. P. 225 ; 16 C. B. 370.

(*s*) *Hornby* v. *Lacy* (1817), 6 M. & S. 166.

(*t*) See Articles 92 to 94.

(*u*) *Sadler* v. *Leigh* (1815), 4 Camp. 195.

(*a*) *Greer* v. *Downs Supply Co.*, [1927] 2 K. B. 28 ; 96 L. J. K. B. 534, C. A.

ordered goods for the business in her own name. Held, that the husband was liable for the price of the goods (*b*).

3. S, a solicitor, practised in the name of S and C. C was also a solicitor, but acted as clerk to S. Held, that S, being the real principal, was entitled to sue alone upon a contract made in the name of the firm (*c*).

4. A part-owner of a whaling vessel sold whale oil in his own name. Held, that the owners were entitled to sue jointly for the price, though the purchaser did not know that any person besides the seller was interested (*d*). So, if three persons agree that one of them shall buy goods in his own name on their joint behalf, they may jointly sue the seller for breach of a contract made in pursuance of such agreement (*e*).

5. The law clerk of the trustees of a public road retains a parliamentary agent on behalf of the trustees. The trustees are directly liable to the agent for his costs, in the absence of an agreement to the contrary (*f*).

6. An agent entered into a contract in his own name for the purchase of property, and paid a deposit. Held, that on the default of the vendor, the principal was entitled to sue in his own name for the return of the deposit (*g*).

7. A custom-house officer took exorbitant fees from a shipmaster. Held, that the owner of the vessel had a right to sue in his own name to recover the amount paid in excess of the proper fees (*h*).

8. An agent appointed by the managing owner of a ship demanded too much freight from the consignees of certain goods, and refused to deliver the goods until payment. The consignees paid the amount demanded, under protest, and sued one of the part-owners of the ship for the excess. Held, that the defendant was liable, though no portion of the money had come to his hands (*i*).

9. An auctioneer receives a deposit at a sale by auction. Though it is his duty to hold the deposit as a stakeholder, he is so far the agent of the vendor in receiving it, that the vendor is responsible to the purchaser in the event of a loss through the insolvency of the auctioneer (*k*).

10. A is the managing part-owner of a ship. He becomes a member of a mutual insurance association, and insures the ship under the rules and regulations of that association. By the terms of the policy and rules of the association, the right to recover in respect of losses, and the liability for contributions in the nature of premiums, are confined to members of the association. The other part-owners, not being members of the association, cannot as undisclosed principals of A sue for any losses, nor can they be sued for contributions due in respect of the policy, even if A fail to pay them,

(*b*) *Petty* v. *Anderson* (1825), 3 Bing. 170. Comp. *Smallpiece* v. *Dawes* (1835), 7 C. & P. 40.

(*c*) *Spurr* v. *Cass*, *Cass* v. *Spurr* (1870), L. R. 5 Q. B. 656 ; 39 L. J. Q. B. 249 ; *Kell* v. *Nainby* (1829), 10 B. & C. 20.

(*d*) *Skinner* v. *Stocks* (1821), 4 B. & Ald. 437.

(*e*) *Cothay* v. *Fennell* (1830), 10 B. & C. 671.

(*f*) *Ridgway* v. *Lees* (1856), 25 L. J. Ch. 584.

(*g*) *Norfolk* v. *Worthy* (1808), 1 Camp. 337.

(*h*) *Stevenson* v. *Mortimer* (1778), Cowp. 805.

(*i*) *Coulhurst* v. *Sweet* (1866), L. R. 1 C. P. 649.

(*k*) *Rowe* v. *May* (1854), 18 Beav. 613 ; *Annesley* v. *Muggridge* (1816), 1 Madd. 596 ; *Smith* v. *Jackson* (1816), 1 Madd. 620.

because the right and liability of the principals to sue and be sued are excluded by the terms of the contract (*l*). Otherwise, if the liability for contributions be thrown by the policy on the persons assured, without reference to whether they are members of the association or not ; or if it be provided that the persons assured shall be liable therefor as if they were members (*m*).

11. A signs and addresses a letter to B, undertaking to answer for a certain debt due from C, D being in fact the creditor. Parol evidence is admissible to prove that the letter was addressed to B by D's agent, so as to entitle D to sue A on the guarantee, though D is not named in the letter, and it was addressed to B as if B were the creditor (*n*).

12. An agent executed a charterparty in his own name, and was described in the contract as the owner of the vessel. It was held that the principal was not entitled to give evidence to show that the agent contracted on his behalf, so as to enable him to maintain an action on the contract, because such evidence was inconsistent with the statement that the agent was the owner of the vessel (*o*).

13. The expression " tenant " does not negative agency and oral evidence has been held admissible to show that a person described in a tenancy agreement as the tenant in fact entered into the agreement as agent for another (*p*).

## Article 92

FOREIGN PRINCIPALS

No foreign principal may sue or be sued on any contract made by a home agent, unless the agent had authority to establish privity of contract between the principal and the other contracting party, and it clearly appears from the terms of the contract, or from the surrounding circumstances, that it was the intention of the agent and of the other contracting party to establish such privity of contract (*q*).

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(*l*) *United Kingdom, etc., Ass.* v. *Nevill* (1887), 19 Q. B. D. 110 ; 56 L. J. Q. B. 522, C. A. ; *Montgomerie* v. *U. K., etc., Ass.*, [1891] 1 Q. B. 370 ; 60 L. J. Q. B. 429.

(*m*) *Ocean, etc., Ins. Ass.* v. *Leslie* (1889), 22 Q. B. D. 722 ; *Great Britain, etc., Ass.* v. *Wyllie* (1889), 22 Q. B. D. 710 ; 58 L. J. Q. B. 614, C. A. ; *British Marine, etc., Assn.* v. *Jenkins*, [1900] 1 Q. B. 299 ; 69 L. J. Q. B. 177.

(*n*) *Bateman* v. *Phillips* (1812), 15 East 272.

(*o*) *Humble* v. *Hunter* (1848), 12 Q. B. 310 ; 17 L. J. Q. B. 350. Cp. *Drughorn* v. *Rederi A/B Transatlantic*, [1919] A. C. 203 ; 88 L. J. K. B. 233, H. L. ; *Rederi A/B Argonaut* v. *Hani*, [1918] 2 K. B. 247 ; 87 L. J. K. B. 901 ; *Formby* v. *Formby* (1910), 102 L. T. 116, C. A. See also *O/Y Wasa S. S. Co.* v. *Newspaper Pulp & Wood Exports* (1949), 82 Ll. L. Rep. 936.

(*p*) *Danziger* v. *Thompson*, [1944] K. B. 654 ; [1944] 2 All E. R. 151 ; *Epps* v. *Rothnie*, [1945] K. B. 562 ; [1946] 1 All E. R. 146.

(*q*) *Paterson* v. *Gandasequi* (1812), 15 East 62 ; *Smyth* v. *Anderson* (1849), 18 L. J. C. P. 109 ; 7 C. B. 21 ; *Dramburg* v. *Pollitzer* (1873), 28 L. T. 470 ; *Elbinger, etc.* v. *Claye* (1873), L. R. 8 Q. B. 313 ; 42 L. J. Q. B. 151 ; *Hutton* v. *Bulloch* (1874), L. R. 9 Q. B. 572 ; *Flinn* v. *Hoyle* (1893), 63 L. J. Q. B. 1, C. A. ; *Harper* v. *Keller* (1915), 84 L. J. K. B. 1696 ; *Miller* v. *Smith*, [1917] 2 K. B. 141 ; 86 L. J. K. B. 1259, C. A. ; *Mercer* v. *Wright* (1917), 33 T. L. R. 343. See also *Armstrong* v. *Stokes* (1872), L. R. 7 Q. B. 598 ; 41 L. J. Q. B. 253 ; *Gadd* v. *Houghton* (1876), 1 Ex. D. 357 ; 46 L. J. Ex. 71, C. A. ; *Glover* v. *Langford* (1892), 8 T. L. R. 628. See also 73 S. J. 358 and 61 L. Q. R. 130 for discussions of this subject.

## Article 93

DEEDS

No principal may sue or be sued on any deed, even if it be expressed to be executed on his behalf, unless he be described as a party thereto and it be executed in his name (*r*) ; but where an agent, who has entered into a deed in his own name, is a trustee for his principal of the rights under the deed, the principal may enforce such rights, in the name of the agent, in proceedings to which the agent is a party, as plaintiff or as defendant (*s*).

This article is subject to the Law of Property Act, 1925 (*t*), s. 123 (1) which provides that the donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument or thing in and with his own name and signature, and under his own seal, where sealing is required, by the authority of the donor of the power ; and every assurance, instrument and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof. This provision operates without prejudice to any statutory direction that an instrument is to be executed in the name of an estate owner (*u*).

The Law of Property Act, 1925 (*a*), s. 123, applies only to instruments executed in pursuance of a power of attorney, and, apparently, only where the donor of the power expressly gives the donee authority to act in his own name.

*Illustrations*

1. An agent entered into a contract by deed in his own name, the principal not being named therein. It was held that the principal was not liable to be sued on the contract (*b*).

2. A shipmaster executed a charterparty by deed in his own name " as agent for the owners ". Held, that the owners were not entitled to sue for the freight, because they were not parties to the deed (*c*).

3. An attorney, who was authorised in writing to execute a lease, signed and sealed the lease in and with his own name and seal. It was held that the principal was not entitled to sue on the covenants in the lease, though they were expressed to be made by the tenant with the landlord, because the deed was not executed in his name (*d*).

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(*r*) *Chesterfield Colliery Co.* v. *Hawkins* (1865), 3 H. & C. 677. Illustrations 1 to 4. See § 296 of the American Restatement.
(*s*) Illustration 5.
(*t*) 15 Geo. 5, c. 20.
(*u*) *Ibid.*, s. 123 (2). For such a direction, see *ibid.*, s. 7 (4).
(*a*) 15 Geo. 5, c. 20.
(*b*) In *Re International Contract Co., Pickering's claim* (1871), L. R. 6 Ch. 525.
(*c*) *Schack* v. *Anthony* (1813), 1 M. & S. 573.
(*d*) *Berkeley* v. *Hardy* (1826), 8 D. & R. 102 ; 29 R. R. 261 ; *Southampton* v. *Brown* (1827), 6 B. & C. 718. And see *Chapman* v. *Smith*, [1907] 2 Ch. 97 ; 76 L. J. Ch. 394.

4. A by deed transfers shares to B. In consequence of the winding-up of the company, the transfer cannot be registered, and A is compelled to pay a "call". A has no right of action for indemnity against B's principal, for whom B acted in taking the transfer (*e*).

5. By a contract under seal made between A and B, A agreed to purchase the copyright in certain periodicals from B. A entered into the contract as agent and trustee for himself and C. Held, in an action brought by C against A and B for a declaration that A was agent and trustee as stated above and for specific performance, that as the agency and trusteeship of A had been established and all necessary parties were before the Court, there was jurisdiction to decree specific performance (*f*). In coming to their decision, the Court of Appeal gave effect to the equitable principle that " where a right is held in trust for the benefit of certain *cestuis que trust*, the *cestuis que trust* may, where justice demands, themselves enforce the right in an action to which the trustee is made a party and may do so whether . . . the right to be enforced is a right arising under an instrument under hand or an instrument under seal".

## Article 94

### BILLS, NOTES AND CHEQUES

The only persons liable on a bill of exchange, promissory note, or cheque, are those whose signatures appear thereon (*g*), and in determining whether a signature is that of the principal, or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument is adopted (*h*). No person can be liable as acceptor of a bill except the person on whom it is drawn, unless it be accepted for honour (*i*).

Hence—

(a) where a bill is drawn on the principal, the principal is deemed to be the acceptor, whether the acceptance be in his name or in that of the agent (*k*) ;

(b) where a bill is drawn on an agent, the principal is not liable as acceptor, even if it be accepted in his name and with his authority (*l*) ;

(c) where a signature is placed on a bill, note, or cheque, otherwise than as that of the acceptor of a bill of exchange, the principal is liable only if his name be signed, or the signature be expressed to be made on his behalf (*m*).

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(*e*) *Torrington* v. *Lowe* (1868), L. R. 4 C. P. 26 ; 38 L. J. C. P. 121.

(*f*) *Harmer* v. *Armstrong*, [1934] Ch. 65 ; 103 L. J. Ch. 1, C. A. ; see also 1 Solicitor 47 and 12 C. B. R. 183 ; *Vandepitte* v. *Preferred Accident Insurance Corpn. of New York*, [1933] A. C. 70 ; 102 L. J. P. C. 21, P. C.

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23 ; *Ex p. Rayner, re Waud* (1868), 17 W. R. 64. See § 295 of the American Restatement.

(*h*) Bills of Exchange Act, 1882, s. 26 (2).

(*i*) *Polhill* v. *Walter* (1832), 1 L. J. K. B. 92 ; 3 B. & Ad. 114 ; *Davis* v. *Clarke* (1844), 6 Q. B. 16 ; 13 L. J. Q. B. 305.

(*k*) Illustrations 1 to 3.

(*l*) Illustration 4.

(*m*) Illustrations 5 to 7. *Serrell* v. *Derbyshire Ry.* (1850), 19 L. J. C. P. 371 ; 9 C. B. 811.

*Illustrations*

1. A bill of exchange was addressed to "William Bradwell". His wife wrote across it "Mary Bradwell". On the bill being presented to William Bradwell, he said that he knew all about it and would pay it shortly. Held, that he was liable as acceptor, his promise to pay being sufficient evidence of authority or ratification (*n*).

2. A bill of exchange was addressed to "E. M. and others, trustees of Clarence Temperance Hall", and was accepted by E. M. in his own name. The jury found that E. M. had authority to accept on behalf of all the trustees. Held, that they were all liable as acceptors (*o*).

3. A bill of exchange was addressed to a company, and was accepted by authorised directors in their own names. Held, that the company was liable as acceptor (*p*).

4. A bill of exchange is addressed to A B, and is accepted "A B for and on behalf of C D". C D is not liable as acceptor, even if A B were expressly authorised to accept the bill on his behalf (*q*).

5. A duly authorised agent draws or indorses a bill, or indorses a note or cheque, in his own name. The principal is not liable thereon (*r*). (A firm is not liable unless either the firm name or the names of all the partners appear (*s*).)

6. By a deed of composition, the business of a debtor was assigned to trustees, in trust to continue the business in the name of the debtor. The debtor, being employed by the trustees to carry on the business, in the ordinary course indorsed bills of exchange in his own name. Held, that the trustees were liable as indorsers, the bills being indorsed in the name in which the business was carried on (*t*).

7. A joint stock company was held liable on a promissory note, sealed with the common seal, in the following form :—"We, two directors of P. Society, by and on behalf of the said society, do hereby promise, etc. (Signed) A B, C D, directors" (*u*).

## Article 95

BROKERS' BOUGHT AND SOLD NOTES

Where a broker contracts on behalf of both buyer and seller, an entry of the transaction in his book, signed by him, operates as a memorandum of the contract signed by both parties, in compliance with the Sale of Goods Act, 1893, s. 4 (*a*) ; and a

(*n*) *Lindus* v. *Bradwell* (1848), 17 L. J. C. P. 121 ; 5 C. B. 583.
(*o*) *Jenkins* v. *Morris* (1847), 16 M. & W. 877.
(*p*) *Okell* v. *Charles* (1876), 34 L. T. 822, C. A.
(*q*) *Polhill* v. *Walter* (1832), 3 B. & Ad. 114.
(*r*) *Ducarrey* v. *Gill* (1830), M. & M. 450.
(*s*) *Re Adansonia Fibre Co., Miles' claim* (1874), L. R. 9 Ch. 635 ; 43 L. J. Ch. 732 ; *Ex p. Buckley* (1845), 14 L. J. Ex. 341 ; 14 M. & W. 469 ; *Carolina Bank* v. *Case* (1828), 8 B. & C. 427.
(*t*) *Furze* v. *Sharwood* (1841), 2 Q. B. 388.
(*u*) *Aggs* v. *Nicholson* (1856), 1 H. & N. 165.
(*a*) 56 & 57 Vict. c. 71 ; *Heyman* v. *Neale* (1809), 2 Camp. 337 ; *Thompson* v. *Gardiner* (1876), 1 C. P. D. 777.

mistake in the bought and sold notes does not affect the validity of such a contract (*b*). Where there is no such signed entry, signed bought and sold notes form a binding contract in writing if they substantially agree (*b*) ; but not where there is a material variance between them (*c*).

Where a broker acts on behalf of only one of the parties to a contract, and sends a note thereof to the other party, such note forms the contract, and its validity is not affected by the circumstance that there is a variance in a note sent by him to his own principal (*d*).

## Article 96

### EFFECT OF PARTICULAR CUSTOMS OR USAGES

Where an agent contracts in a particular market, the contract is deemed to be made subject to the rules, regulations, customs and usages of that market (*e*), so far as they are not inconsistent with the express terms of the contract (*f*). Provided that the principal is not bound by any unreasonable rule, regulation, custom or usage, unless he had notice thereof, and agreed to be bound thereby, at the time when he authorised the agent to make the contract (*g*). Provided also that the right of the principal, whether disclosed or undisclosed, to sue in his own name, and his liability to be sued, on a contract made on his behalf, are not affected by the circumstance that it was made in a market, by the rules, regulations, customs or usages of which the agent is personally liable on the contract, and the contract is there regarded as that of the agent alone, whether such rules, regulations, customs or usages were known to the principal at the time when he authorised the agent to make the contract or not (*h*).

*Rules and Usages of the Stock Exchange*

A contract made on the Stock Exchange for the sale of shares does not import any undertaking by the seller that the company will register the transferee as a shareholder (*i*). But it imports that he will do nothing to prevent

(*b*) *Sivewright* v. *Archibald* (1851), 20 L. J. Q. B. 529 ; *Kempson* v. *Boyle* (1865), 34 L. J. Ex. 191 ; 3 H. & C. 763 ; *Goom* v. *Aflalo* (1826), 6 B. & C. 117 ; *Townend* v. *Drakeford* (1843), 1 C. & K. 20.

(*c*) *Grant* v. *Fletcher* (1826), 5 B. & C. 436 ; *Gregson* v. *Ruck* (1843), 4 Q. B. 737 ; *Cowie* v. *Remfry* (1846), 5 Moo. P. C. 232.

(*d*) *McCaul* v. *Strauss* (1883), 1 C. & E. 106.

(*e*) *Hodgkinson* v. *Kelly* (1868), L. R. 6 Eq. 496 ; 37 L. J. Ch. 837 ; *Stray* v. *Russell* (1860), 28 L. J. Q. B. 279 ; 29 L. J. Q. B. 115, Ex. Ch. ; *Graves* v. *Legg* (1857), 26 L. J. Ex. 316 ; 2 H. & N. 210 ; *Case* v. *McClellan* (1872), 25 L. T. 753 ; *Kirchner* v. *Venus* (1859), 12 Moo. P. C. 361, P. C. ; *Thornton* v. *Fehr* (1935), 51 Ll. L. Rep. 330 ; and see Illustrations.

(*f*) *The Alhambra* (1881), 6 P. D. 68 ; 50 L. J. C. P. 36, C. A. ; *Hayton* v. *Irwin* (1879), 5 C. P. D. 130, C. A. Illustration 2.

(*g*) *Sweeting* v. *Pearce* (1859), 7 C. B. (N.S.) 449 ; 29 L. J. C. P. 265 ; *Pearson* v. *Scott* (1878), 9 Ch. D. 198 ; 47 L. J. Ch. 705.

(*h*) See below and Illustrations 5 and 6.

(*i*) *London Founders Ass.* v. *Clarke* (1888), 20 Q. B. D. 576 ; 57 L. J. Q. B. 291, C. A. ; *Casey* v. *Bentley*, [1902] 1 Ir. R. 376, C. A.

such registration (*k*). And a person who, as principal, sells the shares of another is under a duty to deliver a transfer executed by a transferor who is, and continues to be, ready and willing that the transfer should be duly registered (*l*).

By the usage of the Stock Exchange, a jobber who contracts to purchase shares is bound either to purchase them himself, or to substitute the name of another person who is competent and willing to purchase them ; and if such name be not objected to within a certain time limited for that purpose, the jobber is discharged from all liability on the contract (*m*), such a usage is reasonable. But the jobber is not discharged, unless he give the name of a person who is competent to contract, and who can be legally compelled to accept a transfer of the shares. If he give the name of an infant, or of a person who has not authorised his name to be given as a purchaser, he continues to be personally liable on the contract, and must indemnify the seller against liability for calls (*n*). Where a jobber purchases shares " with registration guaranteed", he is bound to register them in his own name in default of registration by the person whose name he gives as a purchaser, because the usage discharging him from liability is inconsistent with the express terms of the contract (*o*).

By the rules of the Stock Exchange a broker who contracts on the Exchange for an undisclosed principal is regarded as the contracting party, but a principal may sue in his own name on the contract, even if he were aware of this rule at the time when he employed the broker (*p*). The rules of the Stock Exchange as to buying in and selling out do not apply to such cases, but only as between members of the Stock Exchange, and the principal cannot, as between himself and the jobber, claim to have his transactions closed at the prices fixed by the Official Assignee for the closing of the transactions of the defaulting broker (*q*). Nor is the right of the jobber to recover against the principal affected by his having claimed and received the difference between the contract and hammer prices from the broker's estate (*r*).

A broker, authorised by several principals to deal on the Stock Exchange in the same security, includes all the orders in one contract with a jobber, according to the usage of the Stock Exchange (*s*). The broker becomes a defaulter before settling day, and his transactions are closed by the Official Assignee. Each of the principals may sue, or be sued in his own name by the jobber in respect of the portion of the contract appropriated to him (*t*).

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(*k*) *Hooper* v. *Herts*, [1906] 1 Ch. 549 ; 75 L. J. Ch. 253, C. A.

(*l*) Illustration 2.

(*m*) Illustration 3.

(*n*) *Nickalls* v. *Merry* (1875), L. R. 7 H. L. 530 ; 45 L. J. Ch. 575, H. L. ; *Maxted* v. *Paine* (1869), L. R. 4 Ex. 203 ; 38 L. J. Ex. 129. See also *Queensland Investment Co.* v. *O'Connell* (1896), 12 T. L. R. 502.

(*o*) *Cruse* v. *Paine* (1869), L. R. 4 Ch. 441 ; 38 L. J. Ch. 225.

(*p*) *Langton* v. *Waite* (1868), L. R. 6 Eq. 165 ; 37 L. J. Ch. 345 ; *Humphrey* v. *Lucas* (1845), 2 C. & K. 152 ; *Lisset* v. *Reave* (1742), 2 Atk. 394 ; *Currie* v. *Booth* (1902), 7 Com. Cas. 77, C. A.

(*q*) Illustration 6.

(*r*) *Stoneham* v. *Wyman* (1901), 6 Com. Cas. 174.

(*s*) See Article 40, Illustration 10.

(*t*) *Scott* v. *Godfrey*, [1901] 2 K. B. 726 ; 70 L. J. K. B. 954 ; *Beckhuson* v. *Hamblett*, [1901] 2 K. B. 73 ; 70 L. J. K. B. 600, C. A.

*Illustrations*

1. A authorises a member of the Stock Exchange to purchase shares on his behalf. A must indemnify the seller against any liability for calls on the shares subsequent to the contract of sale, though the transfer of the shares, by reason of the winding-up of the company, cannot be registered (*o*).

2. Where a firm of solicitors instructed brokers to sell shares belonging to A, and sent to them the share certificate and a blank transfer signed by A ; and the brokers sold the shares and remitted the proceeds to the solicitors ; but A objected to the registration of the transfer ; and the brokers purchased other shares to implement their bargain with the buyer : it was held that the solicitors were acting as principals in the transaction ; and had failed in their duty to the purchaser, so were liable to indemnify the brokers for the cost of the shares bought in substitution (*u*).

3. A employs B, a broker, to sell shares on the Stock Exchange. B sells the shares to C, a jobber, who is also a member of the Stock Exchange. C gives the name of D as purchaser to whom A executes a transfer, and who duly pays for the shares. D does not execute the transfer nor register himself as a shareholder, in consequence of which A is compelled to pay a call in the winding-up of the company. Since such usage is reasonable, C is not liable to indemnify A in respect of the call, though D may be insolvent (*x*).

4. A, through his broker, sells on the Stock Exchange one hundred shares to a jobber, who duly gives the names of B, C, D and E as purchasers of twenty-five shares each. The names are accepted by A, who executes transfers accordingly, and the jobber pays him the price of the shares. In consequence of the winding-up of the company, the transfers cannot be registered. The jobber is discharged from liability to A, and A is entitled to specific performance and indemnity against B, C, D and E respectively, their brokers having duly accepted the transfers and certificates of the shares on their behalf (*a*).

5. A authorises B, a broker and member of the Stock Exchange, to purchase one hundred shares in a certain company. B purchases the shares from a jobber, and passes a ticket with the name of A as purchaser. The ticket is split, according to usage, and a part thereof for fifteen shares is handed to C's brokers, who had contracted to sell that number to the jobber. C executes a transfer of fifteen shares to A, and the transfer and certificates are accepted by B on A's behalf. A refuses to accept the shares, and the company being wound up, C is compelled to pay calls. A must indemnify C in respect of the calls (*b*).

6. A, a broker, buys shares on the Stock Exchange in his own name, the principal being undisclosed. A becomes a defaulter, and his transactions are closed by the Official Assignee. The jobber from whom A bought the

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(*u*) *Hichens* v. *Jackson*, [1943] A. C. 266 ; 112 L. J. K. B. 88, H. L.

(*x*) *Grissell* v. *Bristowe* (1869), L. R. 4 C. P. 36 ; 38 L. J. C. P. 10, Ex. Ch. ; *Maxted* v. *Paine* (1869), L. R. 4 Ex. 203 ; 38 L. J. Ex. 129.

(*a*) *Coles* v. *Bristowe* (1868), L. R. 4 Ch. 3 ; 38 L. J. Ch. 81 ; *Hawkins* v. *Maltby* (1869), L. R. 4 Ch. 200 ; 38 L. J. Ch. 313 ; *Shepherd* v. *Gillespie* (1869), 38 L. J. Ch. 67.

(*b*) *Bowring* v. *Shepherd* (1871), L. R. 6 Q. B. 309, Ex. Ch. ; *Brown* v. *Black* (1873), L. R. 8 Ch. 939 ; 42 L. J. Ch. 814.

shares tenders them to the principal and calls upon him to complete the contract. The principal is bound to complete, and if he refuse to do so, the jobber is entitled to sell the shares on the market and recover any differences from the principal (*c*).

## Article 97

EFFECT ON RIGHT TO SUE THE PRINCIPAL, OF GIVING CREDIT TO OR OBTAINING JUDGMENT AGAINST THE AGENT

Where an agent enters into a contract in such terms that he is personally liable thereon, and a judgment is obtained against him on the contract, the judgment, although unsatisfied, is, so long as it subsists, a bar to any proceedings against the principal on the contract.

Where an agent enters into a contract in such terms that he is personally liable thereon, and the other contracting party, knowing who is the real principal, elects to give exclusive credit to the agent, he is irrevocably bound by his election, and cannot afterwards charge the principal on the contract (*d*). Where such party, knowing who is the principal, sues and recovers judgment against the agent on the contract, he is conclusively deemed to have elected to give exclusive credit to the agent (*e*). Where he has not sued the agent to judgment the question whether he has so elected or not is a question of fact, depending on the circumstances of the particular case (*f*).

Except as in this article provided, the liability of the principal, whether disclosed or undisclosed, upon a contract made on his behalf, is not affected by the facts that the agent is personally liable on the contract and that credit was given to him by the other contracting party (*g*).

A judgment against an agent is a bar to an action against the principal on the contract even though it is unsatisfied (*h*), but if this judgment be set aside

(*c*) *Scott* v. *Ernest* (1900), 16 T. L. R. 498 ; *Levitt* v. *Hamblett*, [1901] 2 K. B. 53 ; 70 L. J. K. B. 520, C. A. ; *Anderson* v. *Beard*, [1900] 2 Q. B. 260 ; 69 L. J. Q. B. 610. And see *Ponsolle* v. *Webber*, [1908] 1 Ch. 254 ; 77 L. J. Ch. 253 ; *Solloway* v. *Johnson*, [1934] A. C. 193 ; 103 L. J. P. C. 49, P. C.

(*d*) Illustrations 3 and 8. *Smethurst* v. *Mitchell* (1859), 28 L. J. Q. B. 241 ; 1 El. & El. 623 ; *Thornton* v. *Meux* (1827), M. & M. 43 ; *Blaine* v. *Holland* (1889), 60 L. T. 285, P. C. As to the fiction whereby the assured is discharged from liability to the underwriters for premiums due in respect of policies of marine insurance, see *Universo Ins. Co.* v. *Merchants Ins. Co.*, [1897] 2 Q. B. 93 ; 66 L. J. Q. B. 564, C. A. See § 307 of the American Restatement.

(*e*) Illustration 4.

(*f*) Illustrations 5 to 8.

(*g*) Illustrations 1, 2, 5 and 7. *Bottomley* v. *Nuttall* (1858), 28 L. J. C. P. 110 ; 5 C. B. (N.S.) 122 ; *Everett* v. *Collins* (1810), 2 Camp. 515 ; *Concordia, etc.* v. *Squire* (1876), 34 L. T. 824, C. A. ; *Young* v. *White* (1912), 28 T. L. R. 87. And see Article 96.

(*h*) *Priestley* v. *Fernie* (1865), 34 L. J. Ex. 172 ; 3 H. & C. 977 ; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504 ; 48 L. J. C. P. 705, H. L. ; *R. M. K. R. M.* v. *M. R. M. V. L.*, [1926] A. C. 761 ; 95 L. J. P. C. 197, P. C.

an action against the principal will succeed, the defence of *res judicata* will not avail him (*i*). The principal cannot be made liable on the contract if the agent has been given exclusive credit. No proceedings, short of suing the agent to judgment, are conclusive proof in point of law of an election to credit the agent exclusively; but such an act as proving for the debt against the agent's estate in bankruptcy after the principal becomes known is, of course, strong evidence of such an election (*k*).

*Husband and Wife*

The position of husband and wife is no different from that of principal and agent except that a wife may make her husband liable for necessaries bought for his household, but even this is not so if exclusive credit is given to the wife when she purchases necessaries (*l*).

A husband and wife were sued jointly for the price of goods supplied to the wife, and judgment was entered against the wife, who in fact bought the goods as agent of her husband. It was held that, the plaintiff having elected to sue the parties jointly and recovered judgment against the wife, he was not entitled to recover against the husband as principal (*m*). So where, in a similar case, judgment was obtained against the wife for a portion of the amount claimed, it was held that the plaintiff was not entitled to recover against the husband in respect of the balance, the fact of signing judgment for part of the claim being an election to treat the wife as liable for the whole debt to the exclusion of the husband (*n*). But it is otherwise where judgment has been recovered against the wife in respect of severable items, in an amount claimed against her, upon the ground that she contracted as principal in respect of those items; and the husband may be sued in respect of the remaining items of the amount upon the ground that she contracted as his agent in relation to those items (*o*).

*Illustrations*

1. An agent buys goods in his own name, and the seller, not knowing that he is acting on behalf of a principal, or not knowing who the principal is, debits him with the price. The seller, on ascertaining who the principal is, may sue him for the price (*p*).

2. A broker buys goods in his own name, and does not mention the principal to the seller until after the broker has become insolvent. The principal is liable to the seller for the price, and has no right to set off a debt due to him from the broker (*q*).

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(*i*) *Partington* v. *Hawthorne* (1888), 52 J. P. 807. But see *Cross* v. *Matthews* (1904), 91 L. T. 500.

(*k*) Illustration 7.

(*l*) *Bentley* v. *Griffin* (1814), 5 Taunt. 356 ; *Metcalfe* v. *Shaw* (1811), 3 Camp. 22.

(*m*) *Morel* v. *Westmoreland*, [1904] A. C. 11 ; 73 L. J. Q. B. 93, H. L. ; *Moore* v. *Flanagan*, [1920] 1 K. B. 919 ; 89 L. J. K. B. 417, C. A. See also *Rutherford* v. *Ounan*, [1913] 2 Ir. R. 265.

(*n*) *French* v. *Howie*, [1906] 2 K. B. 674 ; 75 L. J. K. B. 980, C. A.

(*o*) *Debenhams* v. *Perkins* (1925), 133 L. T. 252.

(*p*) *Thomson* v. *Davenport* (1829), 9 B. & C. 78 ; *Paterson* v. *Gandasequi* (1812), 15 East 62 ; *Campbell* v. *Hicks* (1858), 28 L. J. Ex. 70. See also 3 Texan Law Review, 384.

(*q*) *Waring* v. *Favenck* (1807), 1 Camp. 85.

3. An agent buys goods, and the seller, knowing at the time of the contract who the principal is, elects to give exclusive credit to the agent. The seller cannot subsequently charge the principal (*r*).

4. An agent buys goods in his own name. The seller, after discovering who the principal is, sues the agent to judgment. The seller is conclusively deemed to have elected to look to the agent alone, and cannot subsequently charge the principal (*s*).

5. A broker bought cotton and gave the name of his principal, but inserted his own name as buyer, in the sold note. The seller invoiced the cotton to the broker, and called upon him to accept and pay for it, threatening legal proceedings. Held, in an action by the seller against the principal, that these facts did not necessarily amount to an election to give exclusive credit to the broker, and that the question whether the seller has so elected was one of fact (*t*).

6. A sells goods to an agent, and draws a bill upon him for the price, which the agent accepts. When the bill becomes due, A consents to renew it, adding interest, and again renews the second bill when it becomes due. The third bill is dishonoured, and the agent becomes bankrupt. The principal is liable to A for the price of the goods, unless A intended to give exclusive credit to the agent, and the fact of taking the acceptances is not conclusive proof of such an election (*u*).

7. A bought goods in his own name on behalf of B. The seller discovered that B was the principal, and subsequently, A having filed a liquidation petition, a clerk of the seller, for the purpose of proving in the liquidation, made an affidavit treating A as the debtor, and the affidavit was duly filed. Held, that the seller was not estopped by the affidavit from suing B for the price of the goods (*a*).

8. A & Co., who were the managing owners of several ships belonging to different principals, instructed insurance brokers to effect policies on the ships, and accepted bills drawn by the brokers for premiums paid by them, and it was agreed that if any acceptance should be dishonoured, the brokers should be entitled to cancel policies in whole or in part, and apply the return premiums towards payment of A & Co.'s indebtedness. A & Co. having become bankrupt, the brokers sued the owners of one of the ships for premiums. Held, that the brokers had elected to take A & Co. as their sole debtors (*b*).

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(*r*) *Addison* v. *Gandasequi* (1812), 4 Taunt. 574 ; *Paterson* v. *Gandasequi*, *supra*. There must be actual knowledge who the principal is : *Dunn* v. *Newton* (1884), 1 C. & E. 278.

(*s*) *Priestley* v. *Fernie* (1865), 34 L. J. Ex. 172 ; 3 H. & C. 977 ; *Cross* v. *Matthews* (1904), 91 L. T. 500.

(*t*) *Calder* v. *Dobell* (1871), L. R. 6 C. P. 486 ; 40 L. J. C. P. 224, Ex. Ch. ; *Mortimer* v. *M'Callan* (1840), 6 M. & W. 58.

(*u*) *Robinson* v. *Read* (1829), 9 B. & C. 449 ; *Whitwell* v. *Perrin* (1858), 4 C. B. (N.S.) 412 ; *Reed* v. *White* (1804), 5 Esp. 122 ; *Tempest* v. *Ord* (1815), 1 Madd. 89 ; *The Huntsman*, [1894] P. 214 ; *Marsh* v. *Pedder* (1815), 4 Camp. 257.

(*a*) *Curtis* v. *Williamson* (1874), L. R. 10 Q. B. 57 ; 44 L. J. Q. B. 27 ; *Morgan* v. *Couchman* (1853), 23 L. J. C. P. 36 ; 14 C. B. 100 ; *Taylor* v. *Sheppard* (1835), 1 Y. & Coll. 271 ; *Fell* v. *Parkin* (1882), 52 L. J. Q. B. 99 ; *MacClure* v. *Schemeil* (1871), 20 W. R. 168.

(*b*) *Lamont* v. *Hamilton*, [1907] S. C. 628, Sc.

## Article 98

SETTLEMENT BETWEEN PRINCIPAL AND AGENT AFFECTING RECOURSE TO PRINCIPAL

Where a debt or obligation has been contracted through an agent, and the principal is induced by the conduct of the creditor reasonably to believe that the agent has paid the debt or discharged the obligation, or that the creditor has elected to look to the agent alone for the payment or discharge thereof, and in consequence of such belief pays, or settles or otherwise deals to his prejudice with, the agent, the creditor is not permitted to deny, as between himself and the principal, that the debt has been paid or the obligation discharged, or that he has elected to give exclusive credit to the agent so as to discharge the principal (*c*). But mere delay by the creditor in enforcing his claim, or in making application to the principal for payment of the debt or discharge of the obligation, is not sufficient inducement for this purpose, unless there are special circumstances rendering the delay misleading (*d*).

Except as in this article provided, the principal, whether disclosed or undisclosed, is not discharged, nor is the right of recourse to him affected, by the circumstance that he has paid or settled or otherwise dealt to his prejudice with the agent (*e*).

Where an agent buys goods in his own name from a seller who believes him to be buying on his own account, and, whilst the seller continues to give exclusive credit to the agent, believing him to be the principal and not knowing of any other person in the transaction, the principal in good faith pays the agent for the goods, the principal is discharged from liability to the seller (*f*).

*Illustrations*

1. A creditor takes a security from the agent of his debtor, and gives the agent a receipt for the debt. The principal deals to his detriment with the agent on the faith of the receipt. The principal is discharged from liability to the creditor (*g*).

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(*c*) Illustrations 1 to 4. *Horsfall* v. *Fauntleroy* (1830), 10 B. & C. 755. The principle is that of estoppel by conduct. See § 299 of the American Restatement.

(*d*) Illustration 5. *Davison* v. *Donaldson* (1882), 9 Q. B. D. 623, C. A. In this case the principal was held not to be discharged by a settlement with his agent, though the creditor made no application to the principal until three years after the debt was contracted, the agent having in the meantime become bankrupt. Comp. *Smethurst* v. *Mitchell* (1859), 1 El. & El. 623 ; 28 L. J. Q. B. 241 ; *Fell* v. *Parkin* (1882), 52 L. J. Q. B. 99.

(*e*) Illustration 5. *Heald* v. *Kenworthy* (1855), 10 Ex. 739 ; 24 L. J. Ex. 76 ; *Dent* v. *Dunn* (1812), 3 Camp. 296 ; *Nelson* v. *Powell* (1784), 3 Doug. 410 ; *Macfarlane* v. *Giannacopulo* (1858), 3 H. & N. 850 ; *Pratt* v. *Willey* (1826), 2 C. & P. 350. And see Article 96.

(*f*) *Armstrong* v. *Stokes* (1872), L. R. 7 Q. B. 598 ; 41 L. J. Q. B. 253. This case must be treated as still being law, because it has not been definitely overruled. It is, however, of very doubtful authority, and certainly will not be in the least extended. See *per* Brett, L.J., in *Irvine* v. *Watson* (1880), 5 Q. B. D. 414 ; 49 L. J. Q. B. 531. The decision was expressly confined to the circumstances of the particular case, and was not founded on any general principle.

(*g*) *Wyatt* v. *Hertford* (1802), 3 East 147 ; *Smyth* v. *Anderson* (1849), 7 C. B. 21 ; 18 L. J. C. P. 109.

2. An agent of a debtor offers to pay the debt either in cash or by a bill of exchange. The creditor takes a bill in payment, and it is dishonoured. If the agent had funds of the principal's wherewith to pay the debt, or if the principal deal to his prejudice with the agent on the faith of his having paid it, the principal is discharged from liability to the creditor (*h*).

3. Goods were sold, on the terms that they should be paid for in cash, to an agent who appeared to be buying on his own account. The seller omitted to enforce cash payment, and the principal, not knowing that the seller had not been paid, paid the agent for the goods. Held, that the principal was discharged (*i*).

4. The agent of a debtor paid the debt by means of his own cheque, and the creditor neglected to present the cheque for four weeks, when it was dishonoured, and the agent absconded. There was a reasonable chance that the cheque would have been honoured if it had been presented within three weeks, and the principal had dealt to his detriment with the agent on the faith of the payment. Held, that the principal was discharged (*k*).

5. A employed a broker to buy oil. The broker bought from B, telling him that he was acting for a principal, the terms being that the oil should be paid for by "cash on or before delivery." B delivered the oil without payment, and A, not knowing that B had not been paid, in good faith paid the broker. The broker soon afterwards became insolvent, and B sued A for the price of the oil. It was proved that it was not the invariable custom in the oil trade to insist on prepayment in the case of a sale for "cash on or before delivery." Held, that, in the absence of such an invariable custom, the mere omission to insist on prepayment was not such conduct as would reasonably induce A to believe that the broker had paid for the oil, and that, therefore, A was liable to B for the price (*l*).

## Article 99

FRAUD, MISREPRESENTATION, OR KNOWLEDGE OF AGENT MAY BE SET UP IN AN ACTION BY THE PRINCIPAL

Where a principal seeks to enforce a contract negotiated or made by his agent, the fraud, misrepresentation, non-disclosure, or knowledge of either the principal or the agent may be set up by the other contracting party by way of defence, in the same manner, and with the same effect, as the fraud, misrepresentation, non-disclosure, or knowledge of the principal might have been if he had himself negotiated or made the contract (*m*).

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(*h*) *Smith* v. *Ferrand* (1827), 7 B. & C. 19. Comp. cases cited under Article 97, Illustration 6.

(*i*) *MacClure* v. *Schemeil* (1871), 20 W. R. 168. Comp. *Kymer* v. *Suwercropp* (1807), Camp. 109. Illustration 5.

(*k*) *Hopkins* v. *Ware* (1869), L. R. 4 Ex. 268 ; 39 L. J. Ex. 147.

(*l*) *Irvine* v. *Watson* (1880), 5 Q. B. D. 102, 414 ; 49 L. J. Q. B. 239, 531, C. A. ; *Davison* v. *Donaldson* (1882), 9 Q. B. D. 623, C. A.

(*m*) See Illustrations. *Raphael* v. *Goodman* (1838), 8 A. & E. 565 ; *Foster* v. *Green* (1862), 7 H. & N. 881 ; *Whurr* v. *Devenish* (1904), 20 T. L. R. 385 ; and see p. 217, *post*.

*Illustrations*

1. A person is induced by the material misrepresentations of the directors to contract to take shares in a company. He is entitled to have the contract rescinded, and his name removed from the register of shareholders, and to be repaid the amount paid for the shares (*n*), provided he take steps for that purpose immediately he discovers the falsity of the representations, and before the commencement of the winding-up of the company (*o*). Rescission of the contract is, apparently, the only remedy against the company. A person induced by misrepresentations to become a member of a company cannot, at all events after the commencement of the winding-up of the company, while he is still a member, maintain an action against the company for damages for the misrepresentations, even if they were made fraudulently (*p*). So, if a person be induced by the misrepresentations of an insurance agent to effect a policy, the insurance company is not entitled to retain the benefit of the contract, though it did not authorise the misrepresentations (*q*).

2. An agent who was employed to find a purchaser for certain property misrepresented certain facts bearing on the value of the property. Specific performance was refused (*r*). So, where an agent, in negotiating for the purchase of property, falsely denied that he was buying it on behalf of a certain person, with the knowledge that if he disclosed the fact the other party would not enter into the contract, the Court refused to decree specific performance (*s*). But where the personal qualification of the real purchaser is immaterial, non-disclosure of his identity will not form a ground of defence to specific performance (*t*).

3. A local agent of a bank lends money to an executor, who mortgages property of the testator to the banker as security for repayment. The executor, to the knowledge of the agent, intended to and does misapply the money. The mortgage is invalid, and the banker has no claim against the estate of the testator (*u*).

4. A, knowing that his sheep are diseased, employs an agent to sell them, and conceals their condition from him, intending him to sell them as sound.

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(*n*) *Reese River Mining Co.* v. *Smith* (1869), L. R. 4 H. L. 64 ; 39 L. J. Ch. 849 ; *Wainwright's case* (1890), 6 T. L. R. 413, C. A. ; *Western Bank of Scotland* v. *Addie* (1867), L. R. 1 H. L. (Sc.) 145, H. L. See also *Hilo Manufacturing Co.* v. *Williamson* (1912), 28 T. L. R. 164, C. A.

(*o*) *Oakes* v. *Turquand* (1867), L. R. 2 H. L. 325 ; 36 L. J. Ch. 949, H. L. ; *Ogilvie* v. *Currie* (1868), 37 L. J. Ch. 541 ; *Stone* v. *City and County Bank* (1877), 47 L. J. C. P. 681 ; 3 C. P. D. 282, C. A. ; *Pawle's case* (1869), L. R. 4 Ch. 497 ; 38 L. J. Ch. 412 ; *Tennent* v. *Glasgow Bank* (1879), 4 App. Cas. 615, H. L. ; *Burgess's case* (1880), 15 Ch. D. 507 ; 49 L. J. Ch. 541. Comp. *Re International Socy. of Auctioneers, Baillie's case*, [1898] 1 Ch. 110 ; 67 L. J. Ch. 81.

(*p*) *Houldsworth* v. *Glasgow Bank* (1880), 5 App. Cas. 317, H. L.

(*q*) *Refuge Assurance Co.* v. *Kettlewell*, [1909] A. C. 243 ; 78 L. J. K. B. 519, H. L. ; *Hughes* v. *Liverpool, etc., Socy.*, [1916] 2 K. B. 482 ; 85 L. J. K. B. 1643, C. A.

(*r*) *Mullens* v. *Miller* (1882), 22 Ch. D. 194 ; 52 L. J. Ch. 380 ; *Myers* v. *Watson* (1851), 1 Sim. (N.S.) 523 ; *Wilde* v. *Gibson* (1848), 1 H. L. Cas. 605 ; *Winch* v. *Winchester* (1812), 1 V. & B. 375.

(*s*) *Archer* v. *Stone* (1898), 78 L. T. 34 ; *Whurr* v. *Devenish* (1904), 20 T. L. R. 385.

(*t*) *Nash* v. *Dix* (1898), 78 L. T. 445 ; *Dyster* v. *Randall*, [1926] Ch. 932 ; 95 L. J. Ch. 504.

(*u*) *Collinson* v. *Lister* (1855), 7 De G. M. & G. 634.

The agent, believing the sheep to be sound, so represents them to the purchaser. The contract is voidable, on the ground of the principal's fraud (*a*).

5. A instructed B to re-insure an overdue ship at a certain rate. B was unable to obtain the rate mentioned, but received a quotation at a higher rate from C. B then heard that the vessel was lost, and wired in A's name to C to insure at the higher rate. Subsequent negotiations took place between A and C, and ultimately C re-insured the vessel at a higher rate than that originally quoted by him. The jury found that the insurance was effected through B's agency. Held, that A could not recover on the policy, because B had not disclosed to C the fact that he had heard of the loss of the ship (*b*).

6. An agent sent notes to his principal by carrier, and they were lost in transit. The carrier had given notice to the principal that he would not be liable for the loss of notes, but had not given any such notice to the agent. An action being brought by the principal in respect of the loss of the notes, it was held that the carrier was not liable (*c*).

7. A partner sold goods, which were packed, to his knowledge, for the purpose of smuggling. Held, that the firm were not entitled to recover the price of the goods, though the other partners were not aware of the illegal nature of the transaction (*d*).

8. An agent of a firm of printers contracted with A for the printing of copies of a manuscript which, to the knowledge of both A and the agent, contained libellous matter. Held, that the printers were not entitled to recover the cost of work done under the contract, although they had no actual notice of the libellous nature of the manuscript, the knowledge of the agent being equivalent to their knowledge (*e*).

## Article 100

### SETTLEMENT WITH, OR SET-OFF AGAINST, AGENT AFFECTING RIGHTS OF PRINCIPAL

Every person who, in dealing with an agent, is led by the conduct of the principal to believe, and does in fact believe, that the agent is the principal in the transaction, is discharged from liability by payment to or settlement with the agent in any manner which would have operated as a discharge if the agent had been the principal (*f*), and is entitled, as against the principal, to the same right of set-off in respect of any debt due from the agent personally as he would have been entitled to if the agent had been the

(*a*) *Ludgater* v. *Love* (1881), 44 L. T. 694, C. A. ; *Stevens* v. *Legh* (1853), 2 C. L. R. 251 ; and see p. 217, *post*.

(*b*) *Blackburn* v. *Haslam* (1888), 21 Q. B. D. 144 ; 57 L. J. Q. B. 479 ; *Morrison* v. *Universal Ins. Co.* (1873), L. R. 8 Ex. 197 ; 42 L. J. Ex. 115, Ex. Ch. But it is not necessary to disclose information acquired after the slip has been signed by the underwriters : *Cory* v. *Patton* (1874), L. R. 9 Q. B. 577 ; 43 L. J. Q. B. 181.

(*c*) *Mayhew* v. *Eames* (1825), 3 B. & C. 601. See also *Bartlett* v. *Purnell* (1836), 4 A. & E. 792.

(*d*) *Biggs* v. *Lawrence* (1789), 3 T. R. 454.

(*e*) *Apthorp* v. *Neville* (1907), 23 T. L. R. 575.

(*f*) Illustration 1. *Curlewis* v. *Birkbeck* (1863), 3 F. & F. 894. And see *Favenc* v. *Bennett* (1809), 11 East 36 ; *Blackburn* v. *Scholes* (1810), 2 Camp. 343.

principal (*g*) ; provided that he had not, at the time when the payment or settlement took place, or the set-off accrued, received actual notice that the agent was not in fact the principal (*h*).

Where a principal permits his agent to have the possession of goods, or of the documents of title thereto, he is deemed, for the purposes of this article, by his conduct to hold out the agent as the owner of the goods (*i*).

Where an agent, being duly authorised in that behalf, contracts in his own name in respect of goods upon which he has a lien as against the principal, the right of the principal to sue on the contract, during the time that the claim secured by the lien remains unsatisfied, is subservient to that of the agent ; and a payment to or settlement with the agent during that time operates as a discharge, notwithstanding that the person making the payment or settlement has had notice from the principal or his trustee in bankruptcy not to pay or settle with the agent (*k*) ; and such payment or settlement may, to the extent of the claim secured by the lien of the agent, be by way of set-off or settlement of accounts between the agent and the person making the payment or settlement (*k*).

Except as in this article provided, the defendant, in an action by the principal, has no right to set-off any claim he may have against the agent personally (*l*) ; and the principal is not bound by a payment to, or settlement with, the agent, unless such payment or settlement was made in the ordinary course of business, and in a manner actually or apparently authorised by him (*m*). Notwithstanding any special custom or usage, it is not deemed to be within the apparent scope of the authority of any agent to receive payment on his principal's behalf by way of set-off or settlement of accounts between himself and the person making the payment (*n*).

*Right of Set-off*

The right to set off, as against the principal, a debt due from the agent, is founded upon estoppel, and the buyer must show that he was led by the

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(*g*) Illustrations 3 and 5.

(*h*) Illustrations 6 and 7. *Ex p. Dixon, re Henley* (1876), 4 Ch. D. 133 ; 46 L. J. Bkcy. 20, C. A.

(*i*) See below.

(*k*) Illustrations 8 and 9.

(*l*) Illustrations 2 to 7. *Young* v. *White* (1844), 13 L. J. Ch. 418 ; 7 Beav. 506 ; *Gordon* v. *Ellis* (1846), 15 L. J. C. P. 178 ; 2 C. B. 821 ; *Richardson* v. *Stormont*, [1900] 1 Q. B. 701 ; 69 L. J. Q. B. 369, C. A. ; *Wester Moffat Colliery Co.* v. *Jeffrey*, [1911] S. C. 346.

(*m*) Illustrations 10 to 15. *Campbell* v. *Hassel* (1816), 1 Stark. 233 ; *Kaye* v. *Brett* (1850), 19 L. J. Ex. 346 ; 5 Ex. 269 ; *Mann* v. *Forrester* (1814), 4 Camp. 60 ; *Drakeford* v. *Piercy* (1866), 7 B. & S. 515 ; *Hughes* v. *Morris* (1852), 9 Hare 636 ; *Townsend* v. *Inglis* (1816), Holt 278 ; *Dunlop* v. *De Murrieta* (1886), 3 T. L. R. 166, C. A. ; *Butwick* v. *Grant*, [1924] 2 K. B. 483 ; 93 L. J. K. B. 972.

(*n*) See Article 34, Illustrations 7 and 8 ; Article 38. *Russell* v. *Bangley* (1821), 4 B. & A. 395.

conduct of the principal to believe, and did in fact believe, that the agent was acting as principal (*o*).

Notice in these cases must be actual notice, constructive notice is not enough (*p*).

Where there are mutual credits between the agent and the other contracting party in order to constitute a right of set-off as against the principal, each of the debts must be liquidated (*q*).

*Payment to or Settlement with Agent*

An agent for sale who is not intrusted with the custody of the goods requires express authority to receive payment in order to discharge the buyer (*r*). Where an agent who is known to be such is so authorised, the payment must be in cash in order to bind the principal, unless he authorised the agent, or held him out as having authority, to receive payment in some other form (*s*). But a custom in a particular business to receive payment by cheque is reasonable and binding (*t*).

Where a party contracts with an agent, his right to set-off a debt due from the agent against the principal will depend upon his knowledge of the position of the agent. So, if a factor sells goods in his own name, the buyer dealing with him as principal, and believing him to be selling his own goods, the buyer, in an action by the principal for the price of the goods, has a right to set off a debt due to him from the factor personally, provided that the debt was incurred before he had received notice that the goods did not belong to the factor (*a*).

But if a factor sells goods in his own name, the buyer knowing that he is selling them as factor, but not knowing who is the principal, in an action by the principal against the buyer for the price, the buyer has no right to set-off a debt due to him from the factor (*b*). The circumstance that the factor sells under a *del credere* commission does not affect this rule (*c*).

*Illustrations*

1. A, the owner of certain goods, permits B to hold himself out as the owner thereof. B holds himself out as the owner to C, and C, believing

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(*o*) Illustration 3.

(*p*) *Greer* v. *Downs Supply Co.*, [1927] 2 K. B. 28 ; 96 L. J. K. B. 534, C. A. ; *Manchester Trust* v. *Furness, Manchester Trust* v. *Turner*, [1895] 2 Q. B. 539 ; 64 L. J. Q. B. 766, C. A.

(*q*) *Turner* v. *Thomas* (1871), L. R. 6 C. P. 610 ; 40 L. J. C. P. 271. See Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 31.

(*r*) *Butwick* v. *Grant*, [1924] 2 K. B. 483 ; 93 L. J. K. B. 972.

(*s*) *Sykes* v. *Giles* (1839), 5 M. & W. 645 ; 9 L. J. Ex. 106 ; *Barker* v. *Greenwood* (1836), 2 Y. & C. 414 ; *Coupé* v. *Collyer* (1890), 62 L. T. 927 ; Article 31. Illustrations 4 to 8. Comp. *Anderson* v. *Hillies* (1852), 21 L. J. C. P. 150 ; 12 C. B. 499.

(*t*) *Bridges* v. *Garrett* (1870), L. R. 5 C. P. 451 ; 39 L. J. C. P. 251, Ex. Ch. Such a custom must be proved.

(*a*) *Borries* v. *Imperial Ottoman Bank* (1873), L. R. 9 C. P. 38 ; 43 L. J. C. P. 3 ; *Carr* v. *Hinchliff* (1825), 4 B. & C. 547 ; *Rabone* v. *Williams* (1785), 7 T. R. 360 ; *Baring* v. *Corrie* (1818), 2 B. & A. 137 ; *George* v. *Clagett* (1797), 7 T. R. 359 ; *Ex p. Dixon, re Henley* (1876), 4 Ch. D. 133 ; 46 L. J. Bkcy. 20, C. A.

(*b*) *Semenza* v. *Brinsley* (1865), 34 L. J. C. P. 161 ; 18 C. B. (N.S.) 467 ; *Moor* v. *Clementson* (1809), 2 Camp. 22 ; *Fish* v. *Kempton* (1849), 18 L. J. C. P. 206 ; 7 C. B. 687 ; *Cooper* v. *Strauss* (1898), 14 T. L. R. 233.

(*c*) *Hornby* v. *Lacy* (1817), 6 M. & S. 166.

him to be the owner, receives the goods in part payment of a debt owing by B. C is not liable to A for the price of the goods (*d*).

2. A broker bought goods on behalf of A from a factor who sold them on behalf of B. The broker knew that the factor sold the goods on behalf of a principal, but A thought that he was selling his own goods. B sued A for the price. Held, that A was bound by the knowledge of his broker, and therefore had no right to set off a debt due to him from the factor (*e*).

3. A broker, who was intrusted by his principal with the possession of goods, sold them in his own name without disclosing the principal. The buyer knew that the broker sometimes sold goods in his own name, though acting as a broker, and sometimes sold goods of his own, and in this case had no particular belief one way or the other. Held, that the buyer was not entitled, in an action by the principal for the price, to set off a debt due from the broker personally (*f*).

4. An agent, with consent of the owner, sold goods as principal. The agent afterwards became bankrupt, and the principal sued the buyer for non-acceptance of the goods. Held, that the defendant was not entitled to set up, by way of defence, that there were mutual credits between the agent and himself resulting in a balance in his favour, because the mutual credits clause of the Bankruptcy Act applies only as between the bankrupt and his creditors (*g*).

5. A employed B to collect general average contributions under an insurance policy. B instructed a broker to collect the contributions, the broker believing him to be the principal. B became bankrupt. In an action by A against the broker for the contributions, as money received to his use, it was held that the broker was entitled to set off a debt due from B (*h*).

6. A, who acted as shipping agent for B, a merchant in Havannah, consigned in his own name to C a cargo of tobacco. C, according to his instructions insured the cargo for the benefit of all concerned, having had notice that there was a principal. The cargo was lost, and the insurance money was paid to C after he had received notice that B claimed it. Held, that C was not entitled to set off, as against B, debts due to him from A personally (*i*).

7. Goods were consigned to an agent for sale. The agent pledged the goods to brokers as security for a specific advance, and authorised them to sell. The brokers sold the goods, but before receiving the proceeds had notice that the principal was the owner, and that he claimed the proceeds. Held, that the principal was entitled to the balance of the proceeds after deducting the amount of the advance, and that the brokers were not entitled to set off such balance against a general account due to them from the agent (*k*).

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(*d*) *Ramazotti* v. *Bowring* (1859), 29 L. J. C. P. 30 ; 7 C. B. (N.S.) 851. See also *Coates* v. *Lewes* (1808), 1 Camp. 444.

(*e*) *Dresser* v. *Norwood* (1864), 34 L. J. C. P. 48 ; 17 C. B. (N.S.) 466, Ex. Ch.

(*f*) *Cooke* v. *Eshelby* (1887), 12 App. Cas. 271 ; 56 L. J. Q. B. 505, H. L. ; *Baring* v. *Corrie* (1818), 2 B. & A. 137.

(*g*) *Turner* v. *Thomas*, *supra*, note (*q*).

(*h*) *Montagu* v. *Forwood*, [1893] 2 Q. B. 350, C. A.

(*i*) *Mildred* v. *Maspons* (1883), 8 App. Cas. 874 ; 53 L. J. Q. B. 33, H. L.

(*k*) *Kaltenbach* v. *Lewis* (1885), 10 App. Cas. 617 ; 55 L. J. Ch. 58, H. L.

Otherwise, if they had received the proceeds in the *bona fide* belief that they belonged to the agent, and had credited the amount in the account with the agent before receiving notice of the principal's claim (*l*).

*Where the Agent has a Lien*

8. A factor, who has a lien on goods for advances, sells the goods in his own name. The buyer, though he knew that the factor was acting as an agent, is, to the extent of the factor's lien, discharged by a payment to him, even if the payment be by way of set-off (*m*), or be made after the bankruptcy of the principal, and after notice from the trustee in bankruptcy not to pay the factor (*n*).

9. A factor, who had a lien on goods in excess of their value, sold the goods to A, to whom he was indebted. The factor became bankrupt. A gave credit for the price of the goods, and proved in the bankruptcy for the residue of his debts against the factor. Held, that this settlement was a good answer to an action by the principal against A for the price (*o*).

10. A broker sells goods in the name of his principal to A, who pays the broker for them. The broker absconds without paying over the money to the principal. A is liable to the principal for the price of the goods, unless the broker had authority, or was held out by the principal as having authority, to receive payment, and the mere fact that the principal had on previous occasions authorised him to receive payment for goods sold on his behalf is not sufficient evidence of such authority or holding out (*p*).

*Payment to or Settlement with Agent*

11. A power of attorney to sell stock was given through a country stock-broker to his London agent. The agent sold the stock, and settled with the country broker, who was not authorised to receive payment. The principal did not receive any part of the money. Held, that the principal was not bound by the settlement with the broker, and that the London agent was liable to him for the proceeds of the stock (*q*).

12. An auctioneer sold goods by auction, the conditions providing that the deposit should be paid to him at once, and the balance of the purchase-money on or before delivery. The purchaser duly paid the deposit, and on delivery of the goods gave the auctioneer a bill of exchange for the balance. Before the bill matured, the principal revoked the auctioneer's authority to receive payment, and gave notice of the revocation to the purchaser. Held, that the purchaser was not discharged by the payment to the auctioneer, it not being shown that he was authorised, or that it was customary, to take bills of exchange in payment (*r*).

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(*l*) *Ibid.*; *New Zealand and Australian Land Co.* v. *Watson* (1881), 7 Q. B. D. 374; 50 L. J. Q. B. 433, C. A.

(*m*) *Warner* v. *M'Kay* (1836), 1 M. & W. 591. This case was decided independently of the question of the extent of the factor's lien, and it now appears to be good law only to the extent stated in the text: *ante*, Illustration 3.

(*n*) *Drinkwater* v. *Goodwin* (1775), Cowp. 251.

(*o*) *Hudson* v. *Granger* (1821), 5 B. & A. 27.

(*p*) *Linck* v. *Jameson* (1886), 2 T. L. R. 206, C. A.

(*q*) *Crossley* v. *Magniac*, [1893] 1 Ch. 594.

(*r*) *Williams* v. *Evans* (1866), L. R. 1 Q. B. 352; 35 L. J. Q. B. 111.

13. A was a traveller for a firm to whom B was indebted, and had authority to collect debts due to the firm. The firm wrote a letter to A, saying : " We should like to draw for the amount." A showed the letter to B, who thereupon accepted a bill drawn in blank, and payable to " my order." A afterwards filled in his own name as drawer, and misappropriated the proceeds of the bill. Held, that the firm were not bound by the payment (*s*).

14. An agent is authorised to sell certain goods and receive payment. He sells the goods, and the buyer, knowing that he is acting as an agent, pays him before the credit has expired, deducting discount. The agent does not pay over the money to the principal, and becomes bankrupt before payment is due. The principal is not bound by the payment, unless it be shown that it is customary in the ordinary course of the particular business to make payments before they are due, or that the agent had authority to receive payment otherwise than in accordance with the terms of the contract (*t*).

15. An insurance broker, being authorised to settle and receive payment of a claim under a policy, takes a bill of exchange from the insurer in payment of a general account, including the claim in question, and subsequently discounts the bill, which is duly paid by the insurer. The broker fails without having paid his principal. The principal is not bound by the payment to the broker, it being contrary to the usual custom for an insurance broker to receive payment by a bill of exchange (*u*).

## SECT. 2.—*Liability of the Principal for Wrongs of Agent*

### Article 101

LIABILITY OF THE CROWN FOR WRONGS OF ITS AGENTS

The Crown shall be liable in tort as if it were a private person of full age and capacity in respect of torts committed by its servants or agents : provided that no action will lie in respect of acts or omissions of servants or agents where there would be no cause of action in respect of the act or omission against the servant or agent or his estate (*x*).

The alteration in the law relating to the liability of the Crown for the torts of its agents was introduced by the Crown Proceedings Act, 1947 (*y*). The Act also makes other alterations, the important ones for the purposes of this volume are briefly set out below.

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(*s*) *Hogarth* v. *Wherley* (1875), L. R. 10 C. P. 630 ; 44 L. J. C. P. 330. Comp. *International Sponge Importers* v. *Watt*, [1911] A. C. 279 ; 81 L. J. P. C. 12, H. L.

(*t*) *Catterall* v. *Hindle* (1867), L. R. 2 C. P. 368, Ex. Ch. ; *Heisch* v. *Carrington* (1833), 5 C. & P. 471 ; *Breming* v. *Mackie* (1862), 3 F. & F. 197.

(*u*) *Hine* v. *S. S. Ins. Syndicate* (1895), 72 L. T. 79, C. A.

(*x*) A servant of the Crown is not responsible for the wrongs of his subordinates : *Fraser* v. *Balfour* (1918), 87 L. J. K. B. 1116 ; unless done in obedience to his direct orders : *Raleigh* v. *Goschen*, [1898] 1 Ch. 73 ; 67 L. J. Ch. 59.

(*y*) 10 & 11 Geo. 6, c. 44.

The Crown is liable in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer ; and in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property (*a*). The Crown is bound by the rules governing indemnity and contribution, joint tortfeasors and contributory negligence (*b*).

Where the Crown is bound by a statutory duty which is binding also upon other persons *then* the Crown is subject to all the liabilities in tort (if any) to which the other persons would be liable (*c*).

The Act extends the liability in tort of the Crown to include torts committed by officers of the Crown when performing a function imposed on any officer as such by the common law or statute (*d*).

Excepted from liability are torts committed by any person while discharging " responsibilities of a judicial nature " (*e*). There are also excepted acts done by a person who, though an officer of the Crown, has not been directly or indirectly appointed by the Crown or was not at the material time paid as an officer of the Crown out of the Consolidated Fund, or was not holding an office in respect of which the Treasury certify that the holder thereof would *normally* be so paid (*f*).

Exemption is given for liability in respect of torts causing death or personal injury of a member of the armed forces of the Crown (*g*).

There is also a saving in respect of acts done by virtue of prerogative or any powers or authorities conferred upon the Crown by statute, and in particular those exercisable in time of war or peace for the defence of the realm or maintaining the efficiency of the armed forces (*h*).

## Article 102

WRONGS COMMITTED BY AGENT ACTING WITHIN THE COURSE OF EMPLOYMENT

Where loss or injury is caused to a third person by the wrongful act of an agent who is acting within the course of his employment, the principal is liable jointly and severally with the agent (*i*).

An agent may act either as an independent contractor or as a servant.

An agent who is acting as an independent contractor is not subject to the control of his principal nor subject to the power of the principal to control him. The principal is not liable for the tortious acts of such an agent (*k*) except in certain circumstances.

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(*a*) S. 2 (1). (*b*) S. 4.
(*c*) S. 2 (2). (*d*) S. 2 (3).
(*e*) S. 2 (5). (*f*) S. 2 (6).
(*g*) S. 10. (*h*) S. 11 (1).
(*i*) See Illustrations. As to the effect of judgment against one of them, and as to contribution, see Article 107. As to the immunity of trade unions, see Article 106. As to corporations, see Article 105. Can the master be liable where the agent is not ? See 17 C. B. R. 356 and *White* v. *Proctor*, [1937] O. R. 647, and *Smith* v. *Moss*, 56 T. L. R. 305. See also §§ 220 to 255, 265 to 267 of the American Restatement and §§ 320 to 362, 470 to 491.
(*k*) Illustrations 3 and 4.

The agent who is in the position of a servant, acts within the course of his employment if he commits any wrongful act authorised by his principal or does an authorised act in a wrongful and unauthorised manner. He is acting within the course of his employment even though the principal has expressly prohibited the particular act (*l*) or the act is done for the benefit of the agent and not for that of the principal (*m*). Where the principal expressly prohibits an act, the question in each case is whether the prohibition limits the sphere of employment or merely deals with conduct within that sphere (*n*).

" Seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger " (*o*).

*The Test of Right to Control*

A servant is a person who is subject to the control of his master, whilst an independent contractor is one engaged to produce a particular result without being subject to his principal's orders. In order to decide upon the category into which an agent will fall in any particular case, it is necessary to ask, " Who exercises the right to control the agent ? " There are two classes of cases which show how this question has been applied in practice, those dealing with agents permitted to control a car (*p*), and those in which the position of hospital staffs in relation to the hospital authorities for whom they work has been considered (*q*). In the first class of case the question is whether according to the permission given and the circumstances of the case, the driver is driving, on his own behalf, a car which is bailed to him, or is driving, on behalf of the owner, or under delegation of the task of driving (*r*).

Where a servant is driving his master's vehicle for his own purposes, the liability of the master will depend upon whether the servant is following his employment or has so far abandoned it that he is not acting on behalf of his master (*s*). If it be shown that a servant has authority to drive for some purposes, the burden of proof may be shifted to the master to show that the servant was acting outside the course of his employment (*t*).

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(*l*) Illustration 27.

(*m*) Illustration 9.

(*n*) *Plumb* v. *Cobden Flour Mills Co., Ltd.*, [1914] A. C. 62, *per* Lord Dunedin, at p. 66 ; 83 L. J. K. B. 197.

(*o*) *Per* Holt, C.J., *Hern* v. *Nichols* (*c.* 1700), 1 Salk. 289.

(*p*) Illustrations 3 to 6.

(*q*) Illustration 7, and see cases cited *infra*, and articles by Professor Goodhart at 54 L. Q. R. 553, C. A. Wright at 14 C. B. R. 285, and Bora Laskin at 16 C. B. R. 809.

(*r*) See *Hewitt* v. *Bouvin*, [1940] 1 K. B. 188 ; 109 L. J. K. B. 223, C. A.

(*s*) *Joel* v. *Morison* (1834), 6 C. & P. 501 ; *Sleath* v. *Wilson* (1839), 9 C. & P. 467 ; *Mitchell* v. *Crassweller* (1853), 22 L. J. C. P. 100 ; 13 C. B. 237 ; *Patten* v. *Rea* (1857), 26 L. J. C. P. 235 ; 2 C. B. (N.S.) 606 ; *Storey* v. *Ashton* (1869), L. R. 4 Q. B. 476 ; 38 L. J. Q. B. 223 ; *Cormack* v. *Digby* (1876), Ir. R. 9 C. L. 557 ; *Rayner* v. *Mitchell* (1877), 2 C. P. D. 357 ; *Hatch* v. *L. & N. W. Ry.* (1890), 15 T. L. R. 246, C. A. ; *Sanderson* v. *Collins*, [1904] 1 K. B. 628 ; 73 L. J. K. B. 358 ; *Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413 ; 60 L. J. Q. B. 676 ; Illustration 6.

(*t*) *Laycock* v. *Grayson* (1939), 55 T. L. R. 698.

Both in this country, the Dominions, and America, the position of hospital staffs, especially that of nurses, has caused difficulty. English law on this now appears clearer and, it is submitted, can be stated as follows. A hospital authority is not responsible for the negligent acts of visiting surgeons and physicians who are not under the control of the authority (*u*), but it controls and is responsible for the acts of nurses, radiographers, etc., even though such negligence occurs while the servant is engaged on work which involves the exercise of professional skill (*x*). This liability attached to local authorities and the governing body of a voluntary hospital. In either case it makes no difference whether the patient be treated gratuitously or for reward (*x*). A nurse provided for a private patient by a nursing association is not the servant of the association (*a*). The position of house physicians and surgeons has now been clarified by the Court of Appeal (*b*). A hospital authority is responsible for the negligence of house surgeons and other doctors on the permanent staff of the hospital. The test applied has been whether they act under a contract of service or for services (*c*) but Denning, L. J. has applied the test of who employs the doctor.

### *The Wrongful Act of the Servant*

" A master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. . . . On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible : for in such a case the servant is not acting in the course of his employment, but has gone outside of it " (*d*).

The ways in which the servant may act wrongfully and the consequences of those acts have been classified as follows (*e*) : (1) The servant was using his master's time or his master's place or his master's horses, vehicles, machinery, or tools for his own purposes : then the master is not responsible ; (2) the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment : the master is not responsible : (3) the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorised and would not have authorised had he known of it : the master is nevertheless responsible.

It was at one time thought that if the wrong of the servant was committed

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(*u*) *Evans* v. *Liverpool Corporation*, [1906] 1 K. B. 160 ; 74 L. J. K. B. 72 ; see also the article by C. A. Wright at 14 C. B. R. 699.

(*x*) *Gold* v. *Essex C. C.*, [1942] 2 K. B. 293, C. A. ; *Hillyer* v. *St. Bartholomew's Hospital*, [1909] 2 K. B. 820 ; 78 L. J. K. B. 958, C. A., is supportable on the ground that the plaintiff failed to prove negligence on the part of any servant of the defendants. See *Smith* v. *Martin*, [1911] 2 K. B. 775, 784 ; *Gold* v. *Essex C. C.*, *supra*, at pp. 299, 306, 311.

(*a*) *Hall* v. *Lees*, [1904] 1 K. B. 602 ; 73 L. J. K. B. 819, C. A.

(*b*) *Cassidy* v. *Ministry of Health* [1951] 1 T. L. R. 539; see also *Collins* v. *Hertfordshire C. C.* [1947] K. B. 598.

(*c*) See *Gold* v. *Essex C. C.*, *supra*, *per* Goddard, L.J., at p. 313. See also *Strangeways-Lesmere* v. *Clayton*, [1936] 2 K. B. 11 ; 105 L. J. K. B. 385.

(*d*) *Canadian Pacific Ry. Co.* v. *Lockhart*, [1942] A. C. 591, at p. 599, quoting with approval Salmond on Torts (9th ed.), p. 95. See also *Marsh* v. *Moores* [1949] 2 K. B. 203, 215.

(*e*) *Per* Lord Phillimore in *Goh Choon Seng* v. *Lee Kim Soo*, [1925] A. C. 550, 554.

for his own benefit, the principal would not be liable, but this theory was dispelled by the House of Lords in *Lloyd* v. *Grace, Smith & Co.* (*f*). The principle in this case is that the master is liable for the fraud of his servant committed in the course of his employment, whether for the benefit of the principal or not, provided that it occurred whilst the servant was engaged in something for which he was properly employed (*g*). The principal is liable not only to clients, but also to third parties dealing with his agent, and even if the act of the agent is the forgery of a document. The fact that the wrongful act is based on a forgery does not mean that the act is outside the course of his employment, the test is, what is the ostensible authority of the agent (*h*).

### *Effect of Prohibition*

It is a well-established principle that a principal cannot escape liability for his servant's wrongful act committed in the course of the servant's employment by expressly prohibiting that act (*i*). But an express prohibition may limit the sphere of the employment.

### *Misrepresentation by Principal or Agent where Principal or Agent has Knowledge of the True Facts*

The effect of the cases on this branch of the law is to cause a certain amount of misunderstanding and confusion, but the law now seems to be as follows : (1) The principal is responsible for the fraudulent representation of an agent made directly by the agent to the third party (*k*) ; (2) the principal is liable for fraudulent representations of his agent though they reached the third party through the innocent principal just as if the principal fraudulently caused an innocent agent to communicate a misrepresentation to the third party (*l*) ; (3) where the principal, though having no personal knowledge that the representation is made, yet knows through another agent that it is being made and that it is untrue, the principal is liable (*m*). The important cases have been so interpreted by Atkinson, J. (*n*), who stressed that there must be guilty knowledge of either the principal or agent. A wider interpretation has been placed on the last case, this is that the principal is responsible if he knew that the representations of the innocent agent were untrue, but did not know, nor had he reason to believe, that the agent would make the representations ; and this wider interpretation has been criticised (*o*).

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(*f*) [1912] A. C. 716.

(*g*) See also Winfield (4th ed.), pp. 126-127, Salmond on Torts (10th ed.), p. 94.

(*h*) *Uxbridge Permanent Building Society* v. *Pickard*, [1939] 2 K. B. 248 ; 108 L. J. K. B. 757, C. A.

(*i*) Illustration 27.

(*k*) *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Ex. 259, Ex. Ch.

(*l*) *Pearson* v. *Dublin Corporation*, [1907] A. C. 351 ; 77 L. J. P. C. 1, H. L. Earlier cases must be read in the light of this decision : see *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358 ; *Fuller* v. *Wilson* (1842), 3 Q. B. 58, 68, 1009 ; *Udell* v. *Atherton* (1861), 7 H. & N. 172 ; *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Ex. 259, Ex. Ch. ; *Brett* v. *Clowser* (1880), 5 C. P. D. 376 ; *Ludgater* v. *Love* (1881), 44 L. T. 694, C. A.

(*m*) *London County Freehold, etc., Co.* v. *Berkeley, etc., Co.* (1936), 155 L. T. 190, C. A.

(*n*) *Anglo-Scottish Beet Sugar Corporation* v. *Spalding U. D. C.*, [1937] 2 K. B. 607 ; 106 L. J. K. B. 885.

(*o*) See criticism by Mr. Patrick Devlin (now Devlin, J.) in 53 L. Q. R., p. 344 ; see also article by C. A. Wright in 15 C. B. R. 716. See also §§ 256 to 264 of the American Restatement. See Appendix.

*Servant of One Master working for Another*

A servant may be in the general employment of A, but, as the result of arrangements made between A and B, he may be acting as the servant of B, so as to make B, and not A, responsible for his negligence at the relevant time (*p*). The test is whether the servant is transferred, or only the use and benefit of his work (*q*), and depends upon the extent to which A places the servant under the control and at the disposition of B (*r*). Each case must depend upon its own circumstances (*s*). To carry the matter further, control will be determined by deciding where the authority lies to direct or to delegate to the servant the manner in which the work is to be done. The agreement between the principals does not determine the question, although it may help to determine such other relevant matters as, *e.g.*, who pays the servant or can dismiss him, how long the alternative service is to last, and what machinery is to be employed (*t*).

*The Principal's Liability for False Imprisonment by the Agent*

The liability of a principal for false imprisonment depends upon whether it is within the ordinary course of the agent's employment to arrest persons or give them into custody on behalf of the principal, and the general rule is that an agent or servant has implied authority to do so only when such a course is necessary for the protection of his principal's or master's property (*u*). Where a servant reasonably believes that his master's property is being stolen, he has implied authority, in an emergency, to take reasonable steps to protect it ; and if, with this object, he commit an assault, the master will be responsible, unless the servant use such excess of violence that his act is not within the class of acts which he is impliedly authorised to do (*a*).

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(*p*) *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board*, [1942] A. C. 509 ; *per* Lord Simon, L.C., at p. 513.

(*q*) *Ibid.*, and *per* Lord Wright, at p. 516, both citing *Moore* v. *Palmer* (1886), 2 T. L. R. 781, *per* Bowen, L.J., at p. 782.

(*r*) *Cameron* v. *Nystrom*, [1893] A. C. 308, *per* Lord Herschell, L.C., at p. 312 ; *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board*, *supra*, *per* Lord Wright, at p. 517.

(*s*) *M'Cartan* v. *Belfast Harbour Commissioners*, [1911] 2 Ir. R. 143 ; *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board*, *supra*, *per* Lord Wright, at p. 515. For instances in addition to the cases cited above, see *Quarman* v. *Burnett* (1840), 6 M. & W. 499 ; *Murray* v. *Currie* (1870), L. R. 6 P. C. 24 ; 40 L. J. C. P. 26 ; *Rourke* v. *White Moss Colliery Co.* (1877), 2 C. P. D. 205 ; 46 L. J. Q. B. 283 ; *Donovan* v. *Laing, Wharton and Down Construction Syndicate, Ltd.*, [1893] 1 Q. B. 629 ; 63 L. J. Q. B. 25, C. A. ; *Jones* v. *Scullard*, [1898] 2 Q. B. 565 ; 67 L. J. Q. B. 895 ; *Bain* v. *Central Vermont Ry. Co.*, [1921] 2 A. C. 412 ; *Bull & Co.* v. *West African Shipping, etc., Co.*, [1927] A. C. 686 ; 96 L. J. P. C. 127, P. C. ; *Leggott & Son*, v. *Normanton & Son* (1928), 98 L. J. K. B. 145 ; *Clelland* v. *Edward Lloyd, Ltd.*, [1938] 1 K. B. 272 ; 106 L. J. K. B. 626 ; *Willard* v. *Whiteley, Ltd.*, [1938] 3 All E. R. 779.

(*t*) *Mersey Dock & Harbour Board* v. *Coggins & Griffiths (Liverpool)*, [1947] A. C. 1. See also the judgment of Streatfeild, J., in *Chowdhary* v. *Gillot*, [1947] 2 All E. R. 541.

(*u*) *Edwards* v. *L. & N. W. Ry.* (1870), L. R. 5 C. P. 445 ; 39 L. J. C. P. 241 ; *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270 ; 48 L. J. P. C. 25 ; *Walker* v. *S. E. Ry.* (1870), L. R. 5 C. P. 640 ; 39 L. J. C. P. 346 ; *Rowe* v. *London Pianoforte Co.* (1876), 34 L. T. 450 ; *Roe* v. *Birkenhead, etc., Ry.* (1851), 7 Ex. 36 ; 21 L. J. Ex. 9 ; *Stevens* v. *Hinshelwood* (1891), 55 J. P. 341, C. A. ; *Hanson* v. *Waller*, [1901] 1 K. B. 390 ; 70 L. J. K. B. 231 ; *Line* v. *R. S. P. C. A.* (1902), 18 T. L. R. 634.

(*a*) *Poland* v. *Parr*, [1927] 1 K. B. 236 ; 96 L. J. K. B. 152, C. A.

*Illustrations*

1. A, being hired to sing at a music-hall, and being permitted to choose his own song, sang a song infringing B's copyright. No control was exercised by the proprietor of the music-hall to prevent infringement of copyright. Held, that there was sufficient evidence for the jury of authority to sing the song complained of to render the proprietor liable in an action by B for the infringement (*b*).

2. A, the chairman at a meeting, at the request of B, who took part in the meeting, made a defamatory statement concerning C, and both A and B expressed a desire that the reporters present would take notice of the case. Correct reports having been published, it was held, in an action by C for libel, that there was evidence for the jury of publication by A and B through the reporters, whom they had made their agents (*c*).

3. A, the owner of a motor car, while riding in the car with B, allows B to drive. B causes injury by negligent driving. Unless it can be shown that A has abandoned control, he is liable for the injury (*d*). So, where A, the owner, permitted B to drive when A's driver was riding in the car with B (*e*). So, where the owner permitted another to drive the car, without abandoning the right of control, although neither the owner nor his servant was in the car (*f*). Otherwise, where the right of control is abandoned (*g*).

4. Where a commission agent used his own car for the purpose of getting orders for goods of his principal, it was held that the principal was not liable for damage caused by negligent driving of the agent, who was not the servant or agent of the principal for the purpose of driving the car (*h*).

5. A sent a car for repair to B's garage. B, by arrangement with A, sent the car to C's works for the repairs to be done. When the repairs were completed, B's manager, who had authority on behalf of B to take delivery of the car from C, drove the car from C's works ; but, instead of driving it to B's garage, as was his duty, he used it for a journey of his own, in the course of which it was damaged as the result of his negligent driving. Held, that B was responsible for the manner in which his manager had conducted himself in performing the service of fetching A's car from C's works (*i*).

6. A motor car was deposited at A's garage for safe custody. The night watchman at the garage, who was A's servant, took the car out for his own purposes and caused damage to it by negligent driving. Held, that A was liable for the damage (*k*). The acts of the night watchman were an ill way of executing the work that had been assigned to him (*k*).

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(*b*) *Monaghan* v. *Taylor* (1886), 2 T. L. R. 685.

(*c*) *Parkes* v. *Prescott* (1869), L. R. 4 Ex. 169 ; 38 L. J. Ex. 105. Comp. *Lucas* v. *Mason* (1875), L. R. 10 Ex. 251 ; 44 L. J. Ex. 145.

(*d*) *Samson* v. *Aitchison*, [1912] A. C. 844 ; 82 L. J. P. C. 1, P. C. ; *Pratt* v. *Patrick*, [1924] 1 K. B. 488 ; 93 L. J. K. B. 174 ; *Wheatley* v. *Patrick* (1837), 2 M. & W. 650 ; 6 L. J. Ex. 193.

(*e*) *Reichardt* v. *Shard* (1914), 31 T. L. R. 24, C. A.

(*f*) *Parker* v. *Miller* (1926), 42 T. L. R. 408, C. A.

(*g*) *Britt* v. *Galmoye* (1928), 44 T. L. R. 294.

(*h*) *Egginton* v. *Reader* (1936), 52 T. L. R. 212.

(*i*) *Aitchison* v. *Page Motors Ltd.* (1935), 154 L. T. 128 ; 52 T. L. R. 137.

(*k*) *Central Motors (Glasgow) Ltd.* v. *Cessnock Garage, etc., Co.*, 1925 S. C. 796.

7. The medical officers in charge of a maternity home maintained by a county council admitted a patient for her confinement, without informing her that there had been a recent case of puerperal fever in the home and that she would be exposed to infection. The patient contracted puerperal fever. Held, that the county council were liable in damages (*l*).

Where a patient was injured by the negligence of a competent radiographer, who was the whole-time employee of a county council which carried on the hospital under statutory powers (*m*), the county council was held liable in damages (*n*).

8. A master ordered his servant to lay rubbish near a neighbour's wall, but so as not to touch the wall. The rubbish ran against the wall. Held, that the master was liable for the trespass (*o*). Otherwise, if the servant lay the rubbish in a place which the master has forbidden (*p*).

9. A solicitor's managing clerk, who had a general authority to conduct the conveyancing business of his principal, induced a widow to give him instructions to realise certain properties with a view to the re-investment of the proceeds. For that purpose she handed him her title deeds, for which he gave her a receipt in his principal's name ; and, at his request, she signed two documents, which were not read over or explained to her, and which she thought were necessary for the realisation of the properties. The documents were in fact conveyances of the properties to himself ; and he afterwards disposed of the properties for his own benefit. Held, that the principal was liable for the fraud (*q*).

So, where a solicitor's managing clerk, who was authorised to carry out conveyancing business and to borrow money from building societies, on behalf of clients, upon security of mortgage, obtained an advance from a building society by producing a deed which he knew to be forged, it was held that he was acting within the scope of his apparent authority and that his principal was liable for the fraud, despite the fact that it involved a forgery (*r*). The authority which the clerk purported to exercise, and which upon the face of it he had got, involved leading third parties to change their position on the faith that the business was genuine (*r*).

10. The driver of a tanker, whose duty included the delivery of petrol into storage tanks, while transferring petrol from the tanker to a storage tank at a garage, struck a match for the purpose of lighting a cigarette, and threw the lighted match on the floor, thereby causing a fire. Held, that his employer

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(*l*) *Lindsey C. C.* v. *Marshall*, [1937] A. C. 97 ; 105 L. J. K. B. 614, H. L. (E.).

(*m*) See Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 49), ss. 181, 184.

(*n*) *Gold* v. *Essex C. C.*, [1942] 2 K. B. 293, C. A.

(*o*) *Gregory* v. *Piper* (1829), 9 B. & C. 591 ; *Goh Choon Seng* v. *Lee Kim Soo*, [1925] A. C. 550 ; 95 L. J. P. C. 129, P. C.

(*p*) *Rand* (or *Rank*) v. *Craig*, [1919] 1 Ch. 1 ; 88 L. J. Ch. 45, C. A. ; see also *Bolinbroke* v. *Swindon* (1874), L. R. 9 C. P. 575 ; 43 L. J. C. P. 287.

(*q*) *Lloyd* v. *Grace, Smith & Co.*, [1912] A. C. 716 ; 81 L. J. K. B. 1140, H. L. ; see also *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Ex. 259 ; 36 L. J. Ex. 147, Ex. Ch. ; *Mackay* v. *Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394 ; 43 L. J. P. C. 31, P. C. ; *Swire* v. *Francis* (1877), 3 App. Cas. 106 ; 47 L. J. P. C. 18, P. C. ; *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317.

(*r*) *Uxbridge Permanent Benefit Building Society* v. *Pickard*, [1939] 2 K. B. 248 ; 108 L. J. K. B. 757, C. A. As to the liability of a solicitor to the disciplinary action of the Court for the misdeeds of his clerk, see *Myers* v. *Elman*, [1940] A. C. 282 ; 109 L. J. K. B. 105.

was liable for the damage so caused by the negligent act of the driver, which was done in the course of his employment (*s*).

11. It is not within the ordinary course of employment of the conductor of an omnibus to drive, and his employers are not liable for injuries caused by his negligent driving (*t*). But it is the duty of the driver of an omnibus to prevent another person from driving, or, if he allow another person to drive, to see that he drives properly ; and where, in breach of this duty, the driver allows the conductor to drive, and damage results from the negligent driving of the conductor, the employers are liable, if the effective cause of the damage be the breach of duty by the driver (*u*).

12. An employee of a garage, after serving a customer with petrol, incorrectly thinking that the customer was about to depart without paying or giving up any coupons, pursued him and abused him. The customer paid for the petrol and delivered the appropriate coupons. On saying that he would report the employee to his employers, the employee struck the customer, knocking him unconscious. Held, the assault had no connection whatever with the discharge of any duty to his employers, who were therefore not liable (*x*).

13. The driver of a vehicle had authority to carry his employer's servants, but had been expressly forbidden from carrying other persons, and a notice to this effect was displayed in the vehicle. The driver gave a lift to a person who was not a fellow employee, and who, in dismounting, suffered injury. Held, the driver acted outside the course of his employment so that the employers were not liable (*y*).

14. A, the landlord of a shop, which was let to B, entered the shop with C, whom he invited to assist in searching for an escape of gas. C negligently caused an explosion, which damaged the goods of B on the premises. Held, that A was responsible for the negligence of C, his agent (*a*).

15. A principal is liable for infringement by his agent, acting in the course of his employment, of a patent (*b*), trade mark (*c*), or copyright (*d*).

16. A landlord is liable for wrongful distress committed by a bailiff, acting on the landlord's behalf, and within the scope of the bailiff's employment (*e*). But he is not liable for an unauthorised assault committed by the bailiff in levying a distress (*f*).

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(*s*) *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board*, [1942] A. C. 509 ; 111 L. J. P. C. 138 ; *Jefferson* v. *Derbyshire Farmers, Ltd.*, [1921] 2 K. B. 281 ; 90 L. J. K. B. 1361, C. A. *Williams* v. *Jones* (1865), 3 H. & C. 602, is not good law : see *Century Insurance Co., Ltd.* v. *Northern Ireland Transport Board, supra*.

(*t*) *Beard* v. *L. G. O. Co.*, [1900] 2 Q. B. 530 ; 69 L. J. Q. B. 895, C. A. ; *Gwilliam* v. *Twist*, [1895] 2 Q. B. 84 ; 64 L. J. Q. B. 474, C. A. ; and see *Harris* v. *Fiat Motors* (1900), 22 T. L. R. 566.

(*u*) *Ricketts* v. *Tilling*, [1915] 1 K. B. 644 ; 84 L. J. K. B. 342, C. A.

(*x*) *Warren* v. *Henlys*, [1948] 2 All E. R. 935.

(*y*) *Conway* v. *George Wimpey & Co.*, [1951] 1 T. L. R. 587 ; see also *Twine* v. *Bean's Express Ltd.* (1946), 62 T. L. R. 155.

(*a*) *Brooke* v. *Bool*, [1928] 2 K. B. 578 ; 97 L. J. K. B. 511.

(*b*) *Betts* v. *De Vitre* (1868), L. R. 3 Ch. 429 ; 37 L. J. Ch. 325.

(*c*) *Tonge* v. *Ward* (1869), 21 L. T. 480.

(*d*) Illustration 1.

(*e*) *Hurry* v. *Rickman* (1831), 1 M. & Rob. 126 ; *Smith* v. *Goodwin* (1833), 2 L. J. K. B. 192 ; 4 B. & Ad. 413 ; *Freeman* v. *Rosher* (1849), 13 Q. B. 780 ; 18 L. J. K. B. 340 ; *Hatch* v. *Hale* (1850), 15 Q. B. 10 ; 19 L. J. Q. B. 289 ; *Gauntlett* v. *King* (1857), 3 C. B. (N.S.) 59 ; *Haseler* v. *Lemoyne* (1858), 5 C. B. (N.S.) 530 ; 28 L. J. C. P. 103.

(*f*) *Richards* v. *West Middlesex Waterworks Co.* (1885), 15 Q. B. D. 660 ; 54 L. J. Q. B. 551 ; and see *Radley* v. *L. C. C.* (1913), 109 L. T. 162.

17. The owners and master of a ship are responsible for damage caused by the negligent navigation of a pilot (*g*).

18. Where a solicitor, by indorsement upon a writ of execution, directs the sheriff to seize the goods of the wrong party, the client is liable, it being the solicitor's duty to indorse the writ (*h*). So, if the solicitor issue execution after the debt has been paid (*i*). But a solicitor has no implied authority to direct the sheriff to seize particular chattels (*k*).

19. A clerk, without the authority of his master, used his master's lavatory and negligently left the tap running. Held, that the master was not liable for the damage done (*l*). Otherwise, if the clerk had permission to use the lavatory (*m*).

20. Where a carman left a coal-shoot open in the highway, his master was held liable for injury resulting therefrom (*n*).

21. A sent a barge under the management of his lighterman to be loaded at a wharf. The foreman at the wharf directed the lighterman to move another barge out of his way, and the lighterman did so, causing damage to such other barge. Held, that A was liable to make good the damage (*o*).

22. A harbour master gave the master of a ship permission to use a certain lock for the purpose of clearing the propeller, representing that the lock was level, and that the ship might safely ground there, other vessels having on previous occasions been grounded in the same lock under similar circumstances. The ship was damaged by a sill projecting several inches above the level across the middle of the lock. Held, that the harbour master was acting within the scope of his authority in giving permission to use the lock, and in representing that the ship might safely ground, and that the owners of the dock were liable for the injury (*p*).

23. Certain opium, forming part of a ship's cargo, was damaged in the course of the voyage, and was sold by the master. Held, that there being no necessity for the sale, the shipowners were liable to the consignee for the

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(*g*) Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), s. 15, abolishing the defence of compulsory pilotage : *The Chyebassa*, [1919] P. 201 ; 88 L. J. P. 191. See also *Workington Harbour, etc.* v. *S.S. Towerfield*, [1951] A. C. 112. The Act extends to the United Kingdom and the Isle of Man and applies to all ships, British and foreign. The defence of compulsory pilotage is still available in respect of a collision at a place (*e.g.*, Gibraltar) to which the Act does not extend and where the common law applies : *The Arum*, [1921] P. 12 ; 90 L. J. P. 166.

(*h*) *Jarmain* v. *Hooper* (1843), 1 D. & L. 169 ; *Morris* v. *Salberg* (1889), 22 Q. B. D. 614, C. A. ; *Lee* v. *Rumilly* (1891), 55 J. P. 519, C. A. Comp. *Condy* v. *Blaiberg* (1891), 55 J. P. 580, C. A.

(*i*) *Bates* v. *Pilling* (1826), 6 B. & C. 38 ; *Re Ward* (1862), 31 Beav. 1 ; *Clissold* v. *Cratchley*, [1910] 2 K. B. 244 ; 79 L. J. K. B. 635, C. A.

(*k*) *Smith* v. *Keal* (1882), 9 Q. B. D. 340, C. A. ; *Hewitt* v. *Spiers & Pond, Ltd.* (1896), 13 T. L. R. 64.

(*l*) *Stevens* v. *Woodward* (1881), 6 Q. B. D. 318 ; 50 L. J. Q. B. 231.

(*m*) *Ruddiman* v. *Smith* (1889), 60 L. T. 708.

(*n*) *Whiteley* v. *Pepper* (1876), 2 Q. B. D. 276 ; 46 L. J. Q. B. 436 ; *Daniel* v. *Rickett*, [1938] 2 All E. R. 631.

(*o*) *Page* v. *Defries* (1866), 7 B. & S. 137 ; overruling *Lamb* v. *Palk* (1840), 9 C. & P. 629.

(*p*) *The Apollo*, [1891] A. C. 499 ; 61 L. J. P. 25, H. L. ; *The Burlington* (1895), 72 L. T. 890, C. A. ; *The Ratata*, [1898] A. C. 513 ; 67 L. J. P. 73, H. L. ; *East London Harbour Board* v. *Caledonia Shipping Co.*, [1908] A. C. 271 ; 77 L. J. P. C. 111 ; *The Bien* (1910), 27 T. L. R. 9.

value of the opium (*q*). An unnecessary sale by a shipmaster of any part of the cargo is a conversion for which the shipowners are liable (*r*).

24. A jeweller hired from a jobmaster a brougham with horse and driver, for the use of a traveller who visited customers with a stock of jewels. The driver in the temporary absence of the traveller left the carriage unattended and a thief drove it away and stole the jewels. Held, that it was the duty of the jobmaster to supply a driver whose business it should be to act in the usual way as regards taking care of the carriage in the occasional and temporary absence of the traveller, and that the jobmaster was liable for the loss (*s*).

25. A silversmith hired from a jobmaster a brougham and driver for the use of a traveller, it being understood that the traveller would carry valuable samples and that it would be the duty of the driver to take care of the contents of the brougham during the necessary absence of the traveller. The driver, who was reasonably supposed by the jobmaster to be trustworthy, stole the contents of the brougham during the necessary absence of the traveller. Held, that the jobmaster was not liable for the loss, as the theft was a crime committed by a person who, in committing it, severed his connection with his master and became a stranger (*t*).

26. If an agent, having control of his principal's business, fraudulently prefer a particular creditor, that is a fraudulent preference by the principal (*u*).

27. An omnibus driver, in order to prevent a rival omnibus from overtaking him, drove his omnibus across the road and caused the rival omnibus to overturn. The driver had instructions from his employers not to race with or obstruct other omnibuses. Held, that the employers were liable, the wrongful act being done in the course of the driver's employment (*a*).

28. A servant of A, in disregard of written notice issued to A's employees prohibiting the use of privately owned cars for the purposes of A's business unless adequately protected by insurance, used the servant's uninsured car for the purpose of his ordinary work and by negligent driving injured the plaintiff. Held, that the means of transport was incidental to the execution of what the servant was employed to do ; that the prohibition merely limited the way in which, or means by which, the servant was to execute the work ; and that A was liable to the plaintiff (*b*).

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(*q*) *Tronson* v. *Dent* (1853), 8 Moo. P. C. 419, P. C.

(*r*) *Ewbank* v. *Nutting* (1849), 7 C. B. 797 ; *Cannan* v. *Meaburn* (1823), 1 Bing. 243 ; *Van Omeron* v. *Dowick* (1809), 2 Camp. 42.

(*s*) *Abraham* v. *Bullock* (1902), 86 L. T. 796, C. A. ; see also *Whatman* v. *Pearson* (1868), L. R. 3 C. P. 422 ; *Engelhart* v. *Farrant*, [1897] 1 Q. B. 240 ; 66 L. J. Q. B. 122, C. A. ; *Bontex Knitting Works, Ltd.* v. *St. John's Garage* (1943), 60 T. L. R. 44, 253, C. A.

(*t*) *Cheshire* v. *Bailey* [1905] 1 K. B. 337 ; 74 L. J. K. B. 176, C. A.

(*u*) *Re Drabble* [1930] 2 Ch. 211 ; 99 L. J. Ch. 345, C. A.

(*a*) *Limpus* v. *London General Omnibus Co.* (1862), 32 L. J. Ex. 34 ; 1 H. & C. 526, Ex. Ch. ; and see *Green* v. *London General Omnibus Co.* (1859), 29 L. J. C. P. 13 ; 7 C. B. (N.S.) 290 ; *Ward* v. *General Omnibus Co.* (1837), 42 L. J. C. P. 265, Ex. Ch. ; see also *Ellis* v. *Turner* (1800), 8 T. R. 531 ; *Croft* v. *Alison* (1821), 4 B. & A. 590 ; *Baker* v. *Snell*, [1908] 2 K. B. 825 ; 77 L. J. K. B. 1090, C. A.

(*b*) *Canadian Pacific Ry. Co.* v. *Lockhart*, [1942] A. C. 591 ; 111 L. J. P. C. 113. And see *McKean* v. *Raynor Bros., Ltd.* (1942), 167 L. T. 369, where a servant, ordered to take his master's lorry upon a message, took a private car.

29. A barman gave a person into custody for attempting to pass bad money, the bad money having been returned and good money paid. Held, that the employer was not liable (*c*). So, where a booking clerk gave a person into custody for attempting to steal from the till, after the attempt had ceased, the railway company was held not liable (*d*).

30. *Arresting offenders, etc.*—A bank manager has no implied authority to arrest or prosecute supposed offenders, on behalf of the bank (*e*). Authority to arrest or give persons into custody is only implied when the duties of the agent could not be efficiently performed without such authority (*e*). Thus, a servant has implied authority, as a general rule, to give persons into custody when such a step is necessary for the protection of his master's property, but not merely for the purpose of punishing a supposed wrongdoer (*f*). So, the manager of a restaurant has implied authority to give into custody persons behaving in a riotous manner (*g*).

31. *Servants of railway companies.*—The servants of a railway company have implied authority to remove passengers from carriages in which they are misconducting themselves or travelling without having paid the fare (*h*), and to do whatever else is necessary for the enforcement of the company's bye-laws (*i*). They have, therefore, implied authority to arrest persons infringing the bye-laws, where that remedy is prescribed by statute (*i*). So, a railway booking clerk, part of whose duty is to keep in a till under his charge money belonging to the company, has implied authority to do all acts necessary for the protection of such money ; but he has no implied authority to give into custody a person whom he suspects of having attempted to steal from the till, after the attempt has ceased and there is no further danger to the property of the company (*k*). So, a foreman porter, in charge of a station in the absence of the station-master, has no implied authority to give into custody a person whom he suspects to be stealing the company's property (*l*).

32. An agent, acting on behalf of a vendor, makes fraudulent misrepresentations which induce the sale. The principal is liable in an action for deceit, although he did not authorise the agent to make the misrepresentations (*m*). So a local authority is liable to a contractor for fraudulent misrepresentation,

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(*c*) *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516 ; 60 L. J. Q. B. 238, C. A.

(*d*) *Allen* v. *L. & S. W. Ry.* (1870), L. R. 6 Q. B. 65 ; 40 L. J. Q. B. 55.

(*e*) *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270 ; 48 L. J. P. C. 25, P. C. And see Illustration 29, and Article 105.

(*f*) *Stevens* v. *Hinshelwood* (1891), 55 J. P. 341, C. A. ; *Knight* v. *North Met. Twys. Co.* (1898), 78 L. T. 227 ; *Hanson* v. *Waller*, [1901] 1 K. B. 390 ; 70 L. J. K. B. 231. And see Illustration 29, and Article 105.

(*g*) *Ashton* v. *Spiers* (1893), 9 T. L. R. 606. Comp. *Stedman* v. *Baker* (1896), 12 T. L. R. 451, C. A.

(*h*) *Lowe* v. *G. N. Ry.* (1893), 62 L. J. Q. B. 524.

(*i*) *Edwards* v. *L. & N. W. Ry.* (1870), L. R. 5 C. P. 445 ; 39 L. J. C. P. 241.

(*k*) *Allen* v. *L. & S. W. Ry.* (1870), L. R. 6 Q. B. 65 ; 40 L. J. Q. B. 55.

(*l*) *Farry* v. *G. N. Ry.*, [1898] 2 Ir. R. 352.

(*m*) *Hern* v. *Nichols* (1701), 1 Salk. 289 ; *Taylor* v. *Green* (1837), 8 C. & P. 316 ; *Udell* v. *Atherton* (1861), 30 L. J. Ex. 337 ; 7 H. & N. 172 ; see also *National Exchange Co.* v. *Drew* (1855), 2 Macq. 103, H. L. ; *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Ex. 259, Ex. Ch. ; *Mackay* v. *Commercial Bank* (1874), L. R. 5 C. P. 394 ; 43 L. J. P. C. 31, P. C. ; *Blake* v. *Albion Life Assurance Society* (1878), 4 C. P. D. 94 ; 48 L. J. C. P. 169 ; *Hilo Manufacturing Co.* v. *Williamson* (1911), 28 T. L. R. 164, C. A.

made by their agent, as to the nature of the work to be done under the contract (*n*). A clause in a contract by which the principal disclaims responsibility for the accuracy of statements made by his agent does not exempt the principal from liability for the agent's fraudulent misrepresentations (*n*).

## Article 103

MONEY, ETC., MISAPPROPRIATED BY AGENT

Where the money or property of a third person is received by an agent while acting within the apparent scope of his authority, or is received by the principal, and is misapplied by the agent, in either case, the principal is liable to make good the loss (*o*).

*Illustrations*

1. A local manager, acting as agent for a bank, induced a lady to invest money in paying off a certain mortgage. The money was paid to him for that purpose, and he misappropriated it. Held, that he was acting within the apparent scope of his authority in receiving the money, which must therefore be deemed to have been received by the bank, and that the bank was liable to repay it (*p*).

2. An agent, acting apparently in the ordinary course of business, sent an account to A, representing that certain advances had been made on his account, and drew on him for the amount. It was within the scope of the agent's authority to make advances of that kind, but he had in fact misappropriated the money, and had not made the advances. A accepted and paid the bill. Held, that the principal was liable to A for the amount (*q*).

## Article 104

MONEY, ETC., RECEIVED BY, OR APPLIED FOR BENEFIT OF, PRINCIPAL

Where, by any wrongful or unauthorised act of an agent, the money or property of a third person comes to the hands of the principal, or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount of value of such money or property.

*Illustrations*

1. A manager, who had no authority to borrow money or overdraw his principal's account, having overdrawn the account and misapplied the money, borrowed £20 for the alleged purpose of paying the principal's workmen (but really to make up the defalcations), paid into the principal's account,

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(*n*) *Pearson* v. *Dublin Corporation*, [1907] A. C. 351 ; 77 L. J. P. C. 1, H. L.

(*o*) *Hackney* v. *Knight* (1891), 7 T. L. R. 254 ; *London Freehold, etc., Co.* v. *Suffield*, [1897] 2 Ch. 608 ; 66 L. J. Ch. 790, C. A. ; *Trott* v. *National Discount Co.* (1900), 17 T. L. R. 37 ; *Reckitt* v. *Nunburnholme* (1929), 45 T. L. R. 629. And see Illustrations, and Article 62, Illustration 4. Comp. Article 35, Illustration 3.

(*p*) *Thompson* v. *Bell* (1854), 10 Ex. 10 ; 23 L. J. Ex. 321. Comp. *Bishop* v. *Jersey* (1854), 23 L. J. Ch. 483 ; 2 Drew. 143 ; *Russo-Chinese Bank* v. *Li Yau Sam*, [1910] A. C. 174 ; 79 L. J. P. C. 60.

(*q*) *Swire* v. *Francis* (1877), 3 App. Cas. 106 ; 47 L. J. P. C. 18.

and drew on the account to pay the workmen. Held, that the £20 having been applied for the benefit of the principal, he was liable to repay the amount to the lender (*r*).

2. The secretary of a company forges and discounts certain bills of exchange, and pays the proceeds to his own account, upon which he draws cheques in favour of the company. The company is liable to the discounter to the extent that the proceeds of the bills have been applied for its benefit (*s*).

3. An agent sells, under a forged power of attorney, stock belonging to A, and pays the proceeds to his principal's account. The principal is liable to A for the proceeds (*t*).

4. A banker, having without authority sold certain bonds belonging to A, delivers to A certain other bonds belonging to B, telling A that they were taken in exchange for his bonds. A must deliver up the bonds to B, or pay him their value (*u*).

## Article 105

### CORPORATIONS

Corporations, including incorporated companies (*a*), local authorities (*b*) and statutory undertakers (*c*) are liable for the wrongs of their agents to the same extent as an individual principal would be, except where the act of the agent is *ultra vires* the corporation (*d*).

This article extends to cases in which malice in fact is an essential ingredient in the wrong (*e*).

*Illustrations*

1. A company is liable for the wrongs of its agents committed in the course of their employment, *e.g.*, wrongful detention or conversion (*f*), wrongful distress (*g*), trespass (*h*), or fraud (*i*).

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(*r*) *Reid* v. *Rigby*, [1894] 2 Q. B. 40 ; 63 L. J. Q. B. 451 ; *Bannatyne* v. *McIver*, [1906] 1 K. B. 103 ; 75 L. J. K. B. 120, C. A. ; *Reversion Fund, etc., Co.* v. *Maison Cosway*, [1913] 1 K. B. 364 ; 82 L. J. K. B. 512, C. A.

(*s*) *Ex p. Shoolbred* (1880), 28 W. R. 339.

(*t*) *Marsh* v. *Keating* (1834), 1 Bing. N. C. 198 ; 37 R. R. 75, H. L. Comp. Article 35, Illustration 3.

(*u*) *Glyn* v. *Baker* (1811), 13 East 509.

(*a*) Illustration 1.

(*b*) *Scott* v. *Manchester Corporation* (1857), 26 L. J. Ex. 406 ; 2 H. & N. 204, Ex. Ch. ; *Cowley* v. *Sunderland Corporation* (1861), 30 L. J. Ex. 127 ; 6 H. & N. 565. Illustration 2.

(*c*) *Mersey Docks Trustees* v. *Gibbs* (1864), L. R. 1 H. L. 93, H. L. ; *Coe* v. *Wise* (1866), L. R. 1 Q. B. 711 ; 37 L. J. Q. B. 262 ; *The Rhosina* (1885), 10 P. D. 131 ; 54 L. J. P. 72, C. A. ; Illustration 3.

(*d*) Illustration 3. See also the article in €2 L. Q. R. 345.

(*e*) Illustration 4.

(*f*) *Yarborough* v. *Bank of England* (1812), 16 East 6 ; *Giles* v. *Taff Vale Ry.*, *Taff Vale Ry.* v. *Giles* (1853), 2 E. & B. 822 ; 23 L. J. Q. B. 43 ; *Barnett* v. *Crystal Palace Co.* (1861), 4 L. T. 403.

(*g*) *Smith* v. *Birmingham Gas Co.* (1834), 3 L. J. K. B. 165 ; 3 N. & M. 771.

(*h*) *Maund* v. *Monmouth Canal Co.* (1842), 4 M. & G. 452.

(*i*) *Ranger* v. *G. W. Ry.* (1854), 5 H. L. Cas. 72, H. L. ; *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Ex. 259 ; 36 L. J. Ex. 147, Ex. Ch.

2. A constable of the borough police is not the agent of the borough corporation in exercising police duty (*k*).

3. Railway and tramway companies are responsible for the torts of their servants committed in the course of their employment, *e.g.*, for assaults upon passengers (*l*). Such servants have, generally, implied authority to remove passengers from carriages in which they are travelling without having paid the proper fare, or are misconducting themselves; and if, under misapprehension, they eject an innocent person, the company is liable for their acts (*m*). Where a porter, believing that a passenger was in the wrong train, pulled him out of the compartment, it was held that the jury might find that the porter was acting within the scope of his employment, although it was not part of the porter's duty to remove passengers from the wrong train (*n*). Where the servant of the company is entitled to eject a passenger, the company will be liable if unnecessary violence be used (*o*). But, in any case, the company will not be liable, if the servant be acting from private spite and not in purported pursuance of his duty (*p*).

4. A station-master detained a person for not having paid the fare for his horse, the railway company having no power to arrest in such cases. Held, that the company was not liable, because it was beyond its powers to authorise the detention, and the act was therefore necessarily outside the scope of the station-master's employment (*q*). Otherwise, if the company had power to arrest (*r*). Where a tram conductor gave a passenger into custody for tendering what the conductor thought was bad money, the company was held liable (*s*).

5. A, who had been an agent of an insurance company, and had entered the service of a rival company, visited policy-holders in the first-mentioned company in order to persuade them to transfer their insurances to the rival company, and made derogatory statements concerning the first-mentioned company. B, who was a superintendent of agencies of the first-mentioned company, in order to counteract the injury A was doing to the company's business, but without being expressly authorised to do so, wrote a circular letter to policy-holders containing defamatory statements concerning A which B knew to be false. It was held that the malice of B was imputable to the company, and

(*k*) *Fisher* v. *Oldham Corporation*, [1930] 2 K. B. 364 ; 99 L. J. K. B. 569.

(*l*) The fact that the agent has been convicted and punished for the assault does not affect the liability of the principal : *Dyer* v. *Munday*, [1895] 1 Q. B. 742 ; 64 L. J. Q. B. 448, C. A.

(*m*) *Lowe* v. *G. N. Ry.* (1893), 62 L. J. Q. B. 524 ; *Whittaker* v. *L. C. C.*, [1915] 2 K. B. 676 ; 84 L. J. K. B. 1446.

(*n*) *Bayley* v. *Manchester, Sheffield and Lincolnshire Ry.* (1873), L. R. 8 C. P. 148 ; 42 L. J. C. P. 78, Ex. Ch.

(*o*) *Seymour* v. *Greenwood*, *Greenwood* v. *Seymour* (1861), 7 H. & N. 355 ; 30 L. J. Ex. 327 ; *Smith* v. *North Met. Tram. Co.* (1891), 55 J. P. 630, C. A.

(*p*) *Hutchins* v. *L. C. C.* (1915), 85 L. J. K. B. 1177.

(*q*) *Poulton* v. *L. & S. W. Ry.* (1867), L. R. 2 Q. B. 534 ; 36 L. J. Q. B. 294. See also *Charleston* v. *London Tram. Co.* (1888), 36 W. R. 367, C. A. ; *Ormiston* v. *G. W. Ry.*, [1917] 1 K. B. 598 ; 86 L. J. K. B. 759.

(*r*) *Goff* v. *G. N. Ry.* (1861), 30 L. J. Q. B. 148 ; 3 E. & E. 672 ; *Moore* v. *Metropolitan Ry.* (1872), L. R. 8 Q. B. 36 ; 42 L. J. Q. B. 23 ; *Farry* v. *G. N. Ry.*, [1898] 2 Ir. R. 352. A special constable of a railway company is a servant of the company : *Lambert* v. *G. E. Ry.*, [1909] 2 K. B. 776 ; 79 L. J. K. B. 32, C. A.

(*s*) *Furlong* v. *South London Tram. Co.* (1884), 48 J. P. 329 ; 1 C. & E. 316 ; *Percy* v. *Glasgow Corpn.*, [1922] 2 A. C. 299 ; 91 L. J. P. C. 187, H. L. Comp. *Knight* v. *North Metropolitan Tram. Co.* (1898), 78 L. T. 227.

the libel having been published in the course of B's employment, that the company was liable therefor (*t*). So, it has been held that a voluntary association is liable for a libel published by its servant in the course of his employment, though without special instructions (*u*). And an action for malicious prosecution is maintainable against a corporation or incorporated company (*x*).

## Article 106

TRADE UNIONS

No action will lie against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members, in respect of any tortious act alleged to have been committed by or on behalf of the trade union (*y*).

## Article 107

EFFECT OF JUDGMENT IN TORT AGAINST PRINCIPAL OR AGENT. CONTRIBUTION

Where damage is suffered by any person as the result of a tort, whether a crime or not, judgment recovered against any tortfeasor liable in respect of that damage is not a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage (*a*).

If more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate or of the wife, husband, parent (*b*) or child (*b*)

(*t*) *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423 ; 73 L. J. P. C. 102, P. C. See also *Whitfield* v. *South Eastern Ry.* (1858), E. B. & E. 115 ; *R.* v. *London* (1858), E. B. & E. 122 ; *Nevill* v. *Fine Arts Insurance Co.*, [1895] 2 Q. B. 156 ; 64 L. J. Q. B. 681, C. A. ; *Fitzsimmons* v. *Duncan*, [1908] 2 I. R. 483, C. A. ; and compare *Glasgow Corporation* v. *Lorimer*, [1911] A. C. 209 ; 80 L. J. P. C. 175, H. L. ; *Aiken* v. *Caledonian Ry.*, [1913] S. C. 66.

(*u*) *Ellis* v. *National Free Labour Assn.* (1805), 7 F. 629.

(*x*) *Cornford* v. *Carlton Bank*, [1899] 1 Q. B. 392 ; 68 L. J. Q. B. 196.

(*y*) Trade Disputes Act, 1906 (6 Edw. 7, c. 4), s. 4. The section applies whether the alleged wrong is committed in contemplation or furtherance of a trade dispute or not : *Vacher* v. *London Society of Compositors*, [1913] A. C. 107 ; 82 L. J. K. B. 232, H. L. It extends to an action for an injunction : *Ware and De Freville* v. *Motor Trades Assn.*, [1921] 3 K. B. 40 ; 90 L. J. K. B. 949. See also the Trade Disputes and Trade Unions Act, 1946 (9 & 10 Geo. 6, c. 52) which repealed the Trade Disputes and Trade Unions Act, 1927 (17 & 18 Geo. 5, c. 22). See Appendix.

(*a*) Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30), s. 6 (1). This provision abolishes the rule at common law by which judgment against one joint tortfeasor was a bar to an action against the other or others : see *Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547. A judgment against the principal or agent for a tort committed by the agent is no longer a bar to an action against the agent or principal as the case may be.

(*b*) The expressions " parent " and " child " have the same meaning as in the Fatal Accidents Acts, 1846, 1864 and 1908 (9 & 10 Vict. c. 93 ; 27 & 28 Vict. c. 95 ; 8 Edw. 7, c. 7), as amended by the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), s. 2 ; see Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30), s. 3. The expression " parent " therefore includes a parent (legitimate or related to the child illegitimately, or by adoption), grandparent and step-parent ; and the expression " child " includes a child (legitimate, illegitimate, or adopted), grandchild and stepchild.

of that person against tortfeasors liable in respect of the damage, whether as joint tortfeasors or otherwise, the sums recoverable under the judgments given in those actions may not in the aggregate exceed the amount of the damages awarded by the judgment first given (*c*) and in any of those actions, other than that in which judgment is first given, the plaintiff will not be entitled to costs unless the Court is of opinion that there was reasonable ground for bringing the action (*d*).

Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this provision from any person entitled to be indemnified by him in respect of the liability in respect of which contribution is sought (*e*).

In any proceedings for contribution under this provision the amount of the contribution recoverable from any person is such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage ; and the Court has power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity (*f*).

## Article 108

MISREPRESENTATIONS BY AGENT AS TO CREDIT, ETC. OF THIRD PERSONS

No action can be maintained against a principal in respect of any representation as to the character, conduct, credit, ability, trade or dealings of another person, to the intent that such other person may obtain credit (*g*), unless such representation is in writing, signed by the principal—the signature of an agent is not sufficient, even if expressly authorised by the principal (*h*).

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(*c*) Where the judgment first given is reversed on appeal, these words refer to the judgment first given which is not so reversed ; and where the judgment first given is varied on appeal, the reference is to the judgment so varied : *ibid.*, s. 6 (3) (b).

(*d*) *Ibid.*, s. 6 (1) (b).

(*e*) *Ibid.*, s. 1 (c). Nothing in the section renders enforceable any agreement for indemnity which would not have been enforceable if the section had not been passed : *ibid.*, s. 6 (4). See Article 71.

(*f*) *Ibid.*, s. 6 (2). The Court may order a servant, whose tort has involved his master in liability, to contribute to the extent of the total amount of the damages : *Ryan* v. *Fildes*, [1938] 3 A. E. R. 517.

(*g*) " May obtain credit, money or goods upon (*sic*), unless, etc."

(*h*) Statute of Frauds Amendment Act, 1828 (Lord Tenterden's Act ; 9 Geo. 4, c. 14), s. 6 ; *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301 ; 43 L. J. Q. B. 56, Ex. Ch. ; *Williams* v. *Mason* (1873), 28 L. T. 232. The Act applies to cases where the principal is an incorporated company : *Hirst* v. *West Riding Banking Co.*, [1901] 2 K. B. 560 ; 70 L. J. K. B. 828, C. A.

## SECT. 3.—*Admissions by and Notice to Agents*

### Article 109

AGENT'S ADMISSIONS WHEN EVIDENCE AGAINST THE PRINCIPAL

An admission or representation made by an agent is admissible in evidence against the principal in the following cases : namely,

(a) Where it was made with the authority, express or implied, of the principal ;

(b) Where it has reference to some matter or transaction upon which the agent was employed on the principal's behalf at the time when the admission or representation was made, and was made in the course of that employment (*i*) ;

(c) Where it has reference to some matter or transaction respecting which the person to whom the admission or representation was made had been expressly referred by the principal to the agent for information (*k*).

Provided always, that a report made by an agent to his principal cannot be put in evidence against the principal by a third person as an admission made on behalf of the principal (*l*).

No principal is bound by any unauthorised admission or representation concerning any matter upon which the agent who made it was not employed on his behalf at the time when it was made (*m*), or which was not made in the course of the agent's employment (*n*), unless he expressly referred to the agent for information on the particular matter (*o*).

*Illustrations*

1. A parcel sent by railway was lost in transit. The station-master, in the ordinary course of his duty, made a statement to the police as to the

(*i*) Illustrations 1 to 9. *Standage* v. *Creighton* (1832), 5 C. & P. 406 ; *Meux's Exors.' Case* (1852), 2 De G. M. & G. 522 ; *Ellis* v. *Thompson* (1838), 3 M. & W. 445 ; 7 L. J. Ex. 185. As to statements in bills of lading signed by the master, see *M'Lean* v. *Fleming* (1871), 2 H. L. Sc. App. 128, H. L. ; *Lishman* v. *Christie* (1887), 19 Q. B. D. 333, C. A. ; *Smith* v. *Bedouin S. N. Co.*, [1896] A. C. 70, H. L. Sc. ; *Howard* v. *Tucker* (1831), 1 B. & Ad. 712 ; *The Ida* (1875), 32 L. T. 541, P. C. ; *The Prosperino Palasso* (1872), 29 L. T. 622 ; *Compania Naviera Vasconzada* v. *Churchill*, [1906] 1 K. B. 237 ; 75 L. J. K. B. 94 ; *Crossfield* v. *Kyle Shipping Co.*, [1916] 2 K. B. 885 ; 85 L. J. K. B. 1310, C. A. See also §§ 284 to 291 of the American Restatement.

(*k*) Illustration 10.

(*l*) Illustrations 12 and 13. *Re Djambi* (*Sumatra*) *Rubber Estates* (1912), 107 L. T. 631 ; *Reyner* v. *Pearson* (1812), 4 Taunt. 662 ; 13 R. R. 723 ; *Kahl* v. *Jansen* (1812), 4 Taunt. 565 ; *Swan* v. *Miller*, [1919] 1 Ir. R. 151. See, however, *The Solway* (1885), 10 P. D. 137 ; 54 L. J. P. 83. If it were material to show that the principal had knowledge of the facts in such report, the report would, for that purpose, be admissible.

(*m*) Illustrations 7 and 8. *Fairlie* v. *Hastings* (1803), 10 Ves. 123 ; *Betham* v. *Benson* (1818), Gow. 45 ; *Peto* v. *Hague* (1804), 5 Esp. 134 ; *Allen* v. *Denstone* (1839), 8 C. & P. 760 ; *Tunley* v. *Evans* (1845), 14 L. J. Q. B. 116 ; 2 D. & L. 747 ; *Wagstaff* v. *Wilson* (1832), 4 B. & Ad. 339 ; *Snowball* v. *Goodriche* (1833), 4 B. & Ad. 541.

(*n*) Illustrations 6 and 10. *Schumack* v. *Lock* (1825), 10 Moore 39 ; *Garth* v. *Howard* (1832), 1 L. J. C. P. 129 ; 1 M. & Scott 628 ; 4 R. R. 753 ; *Whitehouse* v. *Abberley* (1845), 1 C. & K. 642 ; *Olding* v. *Smith* (1852), 16 Jur. 497 ; *Meredith* v. *Footner* (1843), 12 L. J. Ex. 183; 11 M. & W. 202.

(*o*) Illustration 9.

absconding of a porter. Held, that the statement was admissible in evidence as an admission by the railway company (*p*).

2. In an action against a railway company for not delivering certain cattle within a reasonable time, it appeared that a servant of the company, a week after the alleged cause of action arose, in answer to the question why he had not sent on the cattle, said that he had forgotten them. Held, that this admission was not admissible in evidence against the company, because it concerned a bygone transaction (*q*).

3. A shipmaster contracted by charterparty to carry certain goods. In an action against the shipowners for not carrying and delivering certain of the goods, letters written by the master to the plaintiff were admitted in evidence to show that the goods had been duly received (*r*). So, where an agent, who was employed to buy certain goods, acknowledged having received them, it was held that the acknowledgment was evidence of a delivery to the principal (*s*).

4. An agent is employed to pay workmen for work done. A promise by him to pay is an admission which can be used against the principal as evidence that the money is due, and if the promise be in writing and signed by the agent, it interrupts the operation in the principal's favour of the Statute of Limitations (*t*).

5. A wife carries on a business on her husband's behalf, and purchases all the goods required for such business. An admission by her as to the state of accounts between her husband and the persons supplying the goods is evidence against the husband, and a written and signed promise by her to pay interrupts the operation of the Statute of Limitations (*u*). So, a part-payment by an agent, in the course of his employment, of a debt owing by the principal, interrupts the operation of the Statute of Limitations (*x*).

6. An agent was authorised to offer part of a debt in discharge of the whole. The creditor refused payment on those terms, and the agent then, without the principal's authority, paid the amount in part discharge of the debt. Held, that such part-payment did not take the debt out of the operation of the Statute of Limitations (*y*).

7. A beneficiary under a will mortgages his share of the testator's estate. The trustees of the will are not the agents of the mortgagor beneficiary to

(*p*) *Kirkstall Brewery* v. *Furness Ry.* (1874), L. R. 9 Q. B. 468 ; 43 L. J. Q. B. 142. See also *Ruddy* v. *Mid. G. W. Ry.* (1880), 8 L. R. Ir. 224 ; *Machin* v. *South Western Ry.* (1847), 10 L. T. (o.s.) 288.

(*q*) *G. W. Ry.* v. *Willis* (1865), 34 L. J. C. P. 195 ; 18 C. B. (N.S.) 748 ; *Johnson* v. *Lindsay* (1889), 53 J. P. 599.

(*r*) *British Columbia, etc., Co.* v. *Nettleship* (1868), L. R. 3 C. P. 330 ; 37 L. J. C. P. 235.

(*s*) *Biggs* v. *Lawrence* (1789), 3 T. R. 454 ; 1 R. R. 740.

(*t*) *Burt* v. *Palmer* (1804), 5 Esp. 145 ; see now Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), ss. 23, 24.

(*u*) *Anderson* v. *Sanderson* (1817), 2 Stark. 204 ; *Palethorp* v. *Furnish* (1796), 2 Esp. 511, n. ; *Emerson* v. *Blonden* (1794), 1 Esp. 142 ; *Meredith* v. *Footner* (1843), 11 M. & W. 202 ; 12 L. J. Ex. 183. See Article 18 as to a wife's acknowledgment of a debt for necessaries.

(*x*) See notes (*t*) and (*u*), above. *Jones* v. *Hughes* (1850), 5 Ex. 104 ; 19 L. J. Ex. 200 ; *Re Hale, Lilley* v. *Foad*, [1899] 2 Ch. 107 ; 68 L. J. Ch. 517, C. A. ; *Watson* v. *Woodman* (1875), L. R. 20 Eq. 721 ; 45 L. J. Ch. 57.

(*y*) *Linsell* v. *Bonsor* (1835), 2 Bing. N. C. 241.

give an acknowledgment of the right of the mortgagee within section 8 of the Real Property Limitation Act, 1874 (*z*).

8. A solicitor or counsel is retained to conduct an action. Statements made by him in the conduct and for the purposes of the action are evidence against the client (*a*). But statements made by him in casual conversation, and not in the course and for the purposes of the action, are not (*b*). So, statements made by a solicitor for the purposes of one action cannot be used as evidence in another action which the solicitor is conducting on behalf of the same client (*c*) ; and admissions made by counsel at a trial have been held not to be binding at a new trial which had been ordered by the Court of Appeal (*d*).

9. An officer or member of a corporation or company answers interrogatories on its behalf. The answers may be read as an admission by the corporation or company (*e*).

10. A refers B to C, for information concerning a particular matter. Statements made by C to B respecting such matter are evidence against A (*f*).

11. The secretary of a tramway company represented that certain money was due from the company. Held, that the company was not estopped by such representation from saying that the money was not due, because it was not within the scope of the secretary's employment to make any such representation (*g*).

12. The chairman of a company makes a statement at a meeting of shareholders. The statement is not an admission made on behalf of the company and cannot be put in evidence as such against the company by any third person (*h*).

13. An agent writes letters to his principal containing an account of transactions performed on his behalf. The letters cannot be put in evidence against the principal by third persons as admissions made on behalf of the principal (*i*).

## Article 110

WHEN NOTICE TO AGENT EQUIVALENT TO NOTICE TO PRINCIPAL

Where any fact or circumstance, material to any transaction, business, or matter in respect of which an agent is employed, comes

(*z*) 37 & 38 Vict. c. 57 (repealed) ; *Re Edward's Will Trusts*, [1937] Ch. 553 ; 106 L. J. Ch. 347. See now Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 23.

(*a*) *Marshall* v. *Cliff* (1815), 4 Camp. 133 ; *Haller* v. *Worman* (1861), 3 L. T. 741.

(*b*) *Petch* v. *Lyon* (1846), 9 Q. B. 147 ; 15 L. J. Q. B. 393 ; *Parkins* v. *Hawkshaw* (1814), 2 Stark. 239 ; *Wilson* v. *Turner* (1808), 1 Taunt. 398 ; *Young* v. *Wright* (1807), 1 Camp. 140 ; *Richardson* v. *Peto* (1840), 1 M. & G. 896.

(*c*) *Blackstone* v. *Wilson* (1857), 26 L. J. Ex. 229.

(*d*) *Dawson* v. *Great Central Ry.* (1919), 88 L. J. K. B. 1177, C. A.

(*e*) *Welsbach, etc., Co.* v. *New Sunlight Co.*, [1900] 2 Ch. 1 ; 69 L. J. Ch. 546, C. A.

(*f*) *Williams* v. *Innes* (1808), 1 Camp. 364 ; *Hood* v. *Reeve* (1828), 3 C. & P. 532 ; *Burt* v. *Palmer* (1804), 5 Esp. 145.

(*g*) *Barnett* v. *South London Tram. Co.* (1887), 18 Q. B. D. 815, C. A.

(*h*) *Re Devala Provident, etc., Co., ex p. Abbott* (1883), 22 Ch. D. 593 ; 52 L. J. Ch. 434 ; and see *Re Djambi* (*Sumatra*) *Rubber Estates* (1912), 107 L. T. 631 ; *Cooper* v. *Metropolitan Board of Works* (1883), 25 Ch. D. 472 ; 53 L. J. Ch. 109, C.A.

(*i*) *Langhorn* v. *Allnutt* (1812), 4 Taunt. 511.

to his knowledge in the course of such employment, and is of such a nature that it is his duty to communicate it to his principal, the principal is deemed to have notice thereof as from the time when he would have received such notice if the agent had performed his duty, and taken such steps to communicate the fact or circumstance as he ought reasonably to have taken (*k*). Provided that—

(a) Where an agent is party or privy to the commission of a fraud upon or misfeasance against his principal, his knowledge of such fraud or misfeasance, and of the facts and circumstances connected therewith, is not imputed to the principal (*l*); and

(b) Where the person seeking to charge the principal with notice knew that the agent intended to conceal his knowledge from the principal, such knowledge is not imputed to the principal (*m*).

Knowledge acquired by an agent otherwise than in the course of his employment on the principal's behalf (*n*), or of any fact or circumstance which is not material to the business in respect of which he is employed (*o*), is not imputed to the principal.

It has been pointed out (*p*) that the authority given to agents differs in each case, so that the authority of one may be so wide that his knowledge will be considered to be the knowledge of his principal, whilst the actual or apparent authority of another is so limited that his knowledge would not be imputed to his principal. For example, it is not the duty of a broker who is employed to effect an insurance to communicate material facts coming to his knowledge to the principal, but only to the insurer (*p*).

The word " knowledge " used in this article is used to cover cases in which an agent is expressly notified of a matter, thus his principal will be deemed to have notice of it if the agent has authority to receive such communication (*q*).

In the absence of sufficient evidence to the contrary, an agent acting for his principal in a transaction, but not authorised to accept for his principal

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(*k*) Illustrations 1 to 7. *Attwood* v. *Small* (1838), 6 C. & F. 232 ; 49 R. R. 115, H. L. ; *Re Halifax Sugar Co.* (1891), 7 T. L. R. 293, C. A. ; *Ex p. Agra Bank, re Worcester* (1868), L. R. 3 Ch. 555 ; 37 L. J. Bk. 23 ; *Graves* v. *Legg* (1857), 2 H. & N. 210 ; 26 L. J. Ex. 316 ; 115 R. R. 497, Ex. Ch. ; *Gosling's Case* (1829), 3 Sim. 301; *Rowland* v. *Chapman* (1901), 17 T. L. R. 669 ; *Rainford* v. *Keith*, [1905] 2 Ch. 147 ; 74 L. J. Ch. 531, C. A. ; *Bunbury* v. *Hibernian Bank*, [1908] 1 Ir. R. 261. See §§ 256, 272, 274 of the American Restatement and also §§ 268 to 271, 273, 275 to 282.

(*l*) Illustrations 8 to 10. *Re Hampshire Land Co.*, [1896] 2 Ch. 743 ; 65 L. J. Ch. 860 ; *Houghton* v. *Nothard*, [1928] A. C. 1 ; 97 L. J. K. B. 76, H. L. ; *Newsholme* v. *Road Transport, etc., Co.*, [1929] 2 K. B. 356 ; 98 L. J. K. B. 751, C. A.

(*m*) *Sharpe* v. *Foy* (1868), 17 W. R. 65, Ch. App.

(*n*) Illustration 11. *Wythes* v. *Labouchere* (1859), 3 De G. & J. 593 ; *Re Marseilles Ry., ex p. Crédit Foncier* (1872), L. R. 7 Ch. 161 ; 41 L. J. Ch. 345 ; *Welsbach, etc., Co.* v. *New Sunlight Co.*, [1900] 2 Ch. 1 ; 69 L. J. Ch. 546, C. A. ; *Wells* v. *Smith*, [1914] 3 K. B. 722 ; *Taylor* v. *Yorkshire Ins. Co.*, [1913] 2 Ir. R. 1 ; *The Hayle*, [1929] P. 275 ; 99 L. J. P. 145.

(*o*) Illustrations 12 to 14, 17, 18. *Wilde* v. *Gibson* (1848), 1 H. L. Cas. 605, H. L. See also *O'Keefe* v. *London & Edinburgh Insurance Co.*, [1928] N. Ir. R. 85.

(*p*) *Blackburn* v. *Vigors* (1887), 12 App. Cas. 531, 537 ; 57 L. J. Q. B. 114, H. L.

(*q*) Illustrations 13, 14, 17 and 18.

a notice in regard to matters appertaining to the same transaction, should be presumed to have acted in the usual way of business by passing on the notice to his principal (*r*). As a general rule, in order that the principal may be deemed to have notice of facts coming to the knowledge of his agent, the facts must come to the agent's knowledge in the course of the transaction with respect to which the question of notice arises (*s*), or, at all events, must be fresh in his memory at the time of such transaction (*t*).

*Notice to Purchasers for Value*

The Law of Property Act, 1925 (*u*), s. 199, provides that a purchaser of property for valuable consideration shall not be prejudicially affected by notice of any instrument, fact, or thing, unless it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him ; or in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such (*a*), or of his solicitor, or other agent, as such (*a*), or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent (*b*).

*Illustrations*

1. An agent of an insurance company negotiated a contract of insurance with a man who had lost the sight of an eye. Held, that the company must be deemed to have had notice that the assured had lost the sight of an eye, and that it could not avoid the contract on the ground of non-disclosure by him of that fact (*c*).

2. A broker bought goods from a factor, knowing him to be selling on behalf of a principal. Held, that the principal for whom the broker acted must be deemed to have had notice that the factor was not selling his own goods (*d*).

3. A ship was driven on a rock and damaged. The master afterwards wrote a letter to the owner, but did not communicate the fact of the ship having been damaged, and, subsequent to the receipt of the letter, the owner insured the ship. Held, that the master ought to have communicated the fact, and that therefore the owner must be deemed to have had knowledge of it at the time of the insurance (*e*). So, where an agent shipped goods, and,

(*r*) *A/S. Rendal* v. *Arcos Ltd.*, [1937] 3 All. E. R. 577, 586. See also the article by C. A. Wright discussing *Wilson* v. *The King*, [1938] 3 D. L. R. 433 ; the acceptance of property by a principal subject to the knowledge of the agent.

(*s*) *Hiern* v. *Mill* (1806), 13 Ves. 120 ; *Wyllie* v. *Pollen*, (1863), 32 L. J. Ch. 782.

(*t*) *Fuller* v. *Benett* (1842), 12 L. J. Ch. 355 ; 2 Hare 394.

(*u*) 15 Geo. 5, c. 20.

(*a*) *I.e.*, as *his* agent, see *Re Cousin's Trusts* (1886), 31 Ch. D. 671 ; 55 L. J. Ch. 662 ; *Meyer* v. *Charters* (1918), 34 T. L. R. 589.

(*b*) See *Maxfield* v. *Burton* (1873), L. R. 17 Eq. 15 ; 43 L. J. Ch. 46.

(*c*) *Bawden* v. *London, etc., Ass. Co.*, [1892] 2 Q. B. 534, C. A. And see *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521 ; *Thornton-Smith* v. *Motor Union Ins. Co.* (1913), 30 T. L. R. 139 ; *Golding* v. *Royal London, etc., Ins. Co.* (1914), 30 T. L. R. 350 ; *Ayrey* v. *British Legal, etc., Ass.*, [1918] 1 K. B. 136 ; 87 L. J. K. B. 513 ; *Keeling* v. *Pearl Ass. Co.* (1923), 129 L. T. 573. Comp. Illustration 10.

(*d*) *Dresser* v. *Norwood* (1864), 17 C. B. (N.S.) 466 ; 34 L. J. C. P. 48, Ex. Ch.

(*e*) *Gladstone* v. *King* (1813), 1 M. & S. 35.

having heard of a loss, purposely refrained from telegraphing to the principal because he thought it might prevent him from insuring, it was held that it was his duty to have telegraphed, and that an insurance effected by the principal after the time when he would have received the telegram was void on the ground of non-disclosure of material facts (*f*).

4. A broker was employed to effect an insurance, but did not effect it. Subsequently, another broker effected a policy in respect of the same risk, on behalf of the same principal. It was sought to avoid the policy on the ground of the non-disclosure of a material fact which had come to the knowledge of the first-mentioned broker in the course of his employment, but which he had not communicated to the principal, and which was not known, either to the principal or to the broker who effected the policy. Held, that the policy was valid (*g*).

5. A has a dog, which is kept at his stables under the care and control of his coachman. The coachman's knowledge of the ferocity of the dog is equivalent to A's knowledge thereof (*h*). So, where the wife of A occasionally attended to his business, which was carried on upon premises where a dog was kept, and B made a complaint to her, for the purpose of its being communicated to A, that the dog had bitten B's nephew, it was held that that was evidence of scienter on the part of A (*i*). So, where complaints were made of a publican's dog, to his barman (*k*). But the mere fact that a servant knows a dog to be dangerous is no evidence of scienter on the part of the master, where the servant has nothing to do with the care or control of the dog, and has not the control of the premises or place where it is kept (*l*).

6. The solicitor of a judgment creditor, having issued execution against the debtor, instructed A, a solicitor at the place where the execution was levied, to take an assignment of the goods seized from the sheriff. A did so, after having received notice of an act of bankruptcy by the debtor. Held, that the creditor must be deemed to have taken the assignment with notice of the act of bankruptcy (*m*). So, if a solicitor, with the consent of his client, put his managing clerk in his place to conduct and manage the matter, notice of an act of bankruptcy to the clerk operates as notice to the solicitor and to the client (*n*).

7. A solicitor induced a client to advance money on mortgage and afterwards induced another client to advance money on the same land. Held,

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(*f*) *Proudfoot* v. *Montefiori* (1867), L. R. 2 Q. B. 511 ; 36 L. J. Q. B. 225 ; *Fitzherbert* v. *Mather* (1785), 1 T. R. 12 ; 1 R. R. 134.

(*g*) *Blackburn* v. *Vigors* (1887), 12 App. Cas. 531 ; 57 L. J. Q. B. 114, H. L.

(*h*) *Baldwin* v. *Casella* (1872), L. R. 7 Ex. 325 ; 41 L. J. Ex. 167.

(*i*) *Gladman* v. *Johnson* (1867), 36 L. J. C. P. 153 ; *Plimmer* v. *Sells* (1834), 3 N. & M. 422. Cp. *Miller* v. *Kimbray* (1867), 16 L. T. 360 (widow not affected by notice to deceased husband).

(*k*) *Applebee* v. *Percy* (1874), L. R. 9 C. P. 647 ; 43 L. J. C. P. 365.

(*l*) *Stiles* v. *Cardiff Nav. Co.* (1864), 33 L. J. Q. B. 310 ; *Cleverton* v. *Uffernel* (1887), 3 T. L. R. 509 ; *Colgett* v. *Norrish* (1886), 2 T. L. R. 471, C. A.

(*m*) *Brewin* v. *Briscoe* (1859), 28 L. J. Q. B. 329 ; 2 El. & El. 116 ; *Rothwell* v. *Timbrell* (1842), 1 Dowl. (N.S.) 778.

(*n*) *Re Ashton, ex p. McGowan* (1891), 64 L. T. 28 ; *Pike* v. *Stephens* (1848), 12 Q. B. 465 ; 17 L. J. Q. B. 282 ; *Pennell* v. *Stephens* (1849), 18 L. J. C. P. 291 ; 7 C. B. 987.

that the last-mentioned client must be deemed to have had notice of the prior mortgage (*o*).

8. A solicitor in the course of a transaction on his client's behalf, became a party to a fraud on the client. Held, that that did not operate as notice to the client of the fraudulent act, because no person would be likely to disclose his own fraud to the person defrauded (*p*). So, where the directors of a company took part in a misfeasance against the company, it was held that their knowledge did not operate as notice to the company of the misfeasance (*q*). But the mere fact that the agent has an interest in concealing facts from his principal is not sufficient to prevent his knowledge of those facts from being imputed to the principal, where it is his duty to communicate them (*r*).

9. A solicitor sells or mortgages property, and himself draws the purchase or mortgage deed and carries the transaction through on behalf, and with the consent, of the purchaser or mortgagee. The purchaser or mortgagee is deemed to have notice of all incumbrances known to the solicitor, even if the solicitor fraudulently conceal them (*s*).

10. An insurance proposal form, signed by the proposer, contained untrue answers which were warranted to be true and which formed the basis of the contract. The answers were filled in by the insurance company's agent, whom the proposer had requested or permitted to fill in the form, after informing him of the true facts. Held, that the company were entitled to repudiate liability on the ground of the untrue answers (*t*). The agent, in filling in the form, was the agent of the proposer. If the agent knew that the answers were untrue, he was committing a fraud which prevented his knowledge being the knowledge of the company ; if he did not know, he had no knowledge to be imputed to the company (*t*).

11. The secretary or a director of a company, in his private capacity, and when he is not transacting the business of the company, casually acquires knowledge of certain facts concerning the company's business. That does not operate as notice to the company of such facts (*u*). So, if a person be secretary of two companies, knowledge acquired by him as secretary of one

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(*o*) *Rolland* v. *Hart* (1871), L. R. 6 Ch. 678 ; 40 L. J. Ch. 701. And see *Le Neve* v. *Le Neve* (1747), 1 Ves. 64.

(*p*) *Cave* v. *Cave*, *Chaplin* v. *Cave* (1880), 15 Ch. D. 639 ; 49 L. J. Ch. 505 ; *Kennedy* v. *Green* (1834), 3 Myl. & K. 699 ; *Waldy* v. *Gray* (1875), L. R. 20 Eq. 238 ; 44 L. J. Ch. 394. Comp. Illustration 9.

(*q*) *Re Fitzroy Bessemer Steel Co.* (1884), 50 L. T. 144.

(*r*) *Thompson* v. *Cartwright* (1863), 33 Beav. 178 ; *Rolland* v. *Hart*, *supra*, note (*o*) ; *Bradley* v. *Riches* (1878), 9 Ch. D. 189 ; 47 L. J. Ch. 811 ; *Dixon* v. *Winch*, [1900] 1 Ch. 736 ; 69 L. J. Ch. 465, C. A. See Illustration 9.

(*s*) *Atterbury* v. *Wallis* (1856), 25 L. J. Ch. 792 ; *Re Weir* (1888), 58 L. T. 792 ; *Boursot* v. *Savage* (1866), L. R. 2 Eq. 134 ; 35 L. J. Ch. 627 ; *Dryden* v. *Frost* (1837), 8 L. J. Ch. 235 ; 3 Myl. & C. 670 ; 45 R. R. 344 ; *Sheldon* v. *Cox* (1764), 2 Eden, 224 ; *Dixon* v. *Winch*, [1900] 1 Ch. 736 ; 69 L. J. Ch. 465, C. A. Comp. *Espin* v. *Pemberton* (1859), 3 De G. & J. 547 ; *Hewitt* v. *Loosemore* (1851), 21 L. J. Ch. 69 ; 9 Hare 449 ; Illustration 8.

(*t*) *Newsholme* v. *Road Transport, etc., Co.*, [1929] 2 K. B. 356 ; 98 L. J. K. B. 751, C. A. See Article 82, Illustration 10 ; *Dunn* v. *Ocean Accident, etc.* (1933), 50 T. L. R. 32, C. A.

(*u*) *Société Générale de Paris* v. *Tramways Union Co.* (1884), 14 Q. B. D. 424 ; 54 L. J. Q. B. 177, C. A. ; *Ex p. Boulton, re Sketchley* (1857), 26 L. J. Bk. 45 ; 1 De G. & J. 163 ; *Ex p. Carbis* (1834), 4 Dea. & Ch. 354 ; *Re Payne, Young* v. *Payne*, [1904] 2 Ch. 608 ; 73 L. J. Ch. 849, C. A.

of the companies will not be imputed to the other company, unless the knowledge was acquired in such circumstances as to make it his duty to communicate it to such other company (*a*).

12. A solicitor who was employed to transfer a mortgage knew that there were incumbrances on the property subsequent to such mortgage. Held, that his knowledge did not operate as notice of the incumbrances to the transferee, because the incumbrances were not material to the transfer, for which alone the solicitor was employed (*b*).

13. Directors of a banking company, who had no voice in the management of the accounts, acquired a knowledge of certain circumstances relating to the accounts. Held, that this did not operate as notice of such circumstances to the company (*c*).

14. An underwriter sought to avoid a policy on the ground of the non-disclosure of a material fact. The fact had been disclosed to his solicitor, but had not been communicated to him. Held, that he was not bound by the disclosure to his solicitor, it not being in the ordinary course of a solicitor's employment to receive mercantile notices as to mercantile transactions (*d*). So, the knowledge of Lloyd's agents is not imputable to individual members of Lloyd's (*e*).

*Communication to Agent*

15. Notice of withdrawal of an application for shares was given during business hours to a clerk at the registered office of the company, the clerk stating that the secretary was out. Held, that it operated as notice to the company (*f*).

16. A notice to quit is served at the house of a tenant upon a servant whose duty it is to deliver it to the tenant. That is good service on the tenant, though the servant does not deliver the notice to him (*g*).

17. Notice of a bankruptcy petition against an execution debtor is given to the man left in possession by the sheriff. That does not operate as notice to the sheriff, because the man in possession is only his agent for the purpose of levying, selling the goods, and handing over the proceeds (*h*).

18. Notice of an incumbrance was given to a solicitor, who had been employed by trustees in all matters relating to the trust in which professional assistance was required, but who had not been authorised to receive notices on their behalf, and the solicitor wrote accepting the notice on behalf of the trustees. Held, that the notice to the solicitor did not operate as notice to the trustees, solicitors not being, as such, standing agents of their clients to receive notices on their behalf (*i*).

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(*a*) *Re Fenwick, Deep Sea Fishery Co.'s claim*, [1902] 1 Ch. 507 ; 71 L. J. Ch. 321.
(*b*) *Wyllie* v. *Pollen* (1863), 32 L. J. Ch. 782 ; *Brittain* v. *Brown* (1871), 24 L. T. 504.
(*c*) *Powles* v. *Page* (1846), 3 C. B. 16 ; *Re Carew's Estate Act* (1862), 31 Beav. 39.
(*d*) *Tate* v. *Hyslop* (1885), 15 Q. B. D. 368 ; 54 L. J. Q. B. 592, C. A.
(*e*) *Wilson* v. *Salamandra Ass. Co.* (1903), 88 L. T. 96.
(*f*) *Truman's Case*, [1894] 3 Ch. 272 ; 63 L. J. Ch. 635.
(*g*) *Tanham* v. *Nicholson* (1872), L. R. 5 H. L. 561, H. L.
(*h*) *Ex p. Warren* (1885), 1 T. L. R. 430, C. A.
(*i*) *Saffron Walden Building Society* v. *Raymer* (1880), 14 Ch. D. 406 ; 49 L. J. Ch. 465, C. A.

## SECT. 4.—*Rights of Principal in Respect of Property Intrusted to Agent*

### Article 111

RIGHT TO FOLLOW PROPERTY INTO HANDS OF THIRD PERSONS

Subject to the provisions of Articles 81, and 85 to 89, where an agent disposes of the money or property of his principal in a manner not authorised by him, the principal is entitled, as against the agent and third persons, to recover such money or property, wheresoever it may be found (*k*).

*Illustrations*

1. A authorises B, a stockbroker, to sell certain shares transferable only by deed, and intrusts him with the certificates and a blank transfer of the shares for that purpose. B deposits the blank transfer and certificates with his banker as security for an advance to himself. The banker has no title to the shares as against A (*l*).

2. An agent fraudulently applies moneys of his principal in the purchase of overdue bills, which he sells to a company. The company has no title to the bills as against the principal, overdue bills not being negotiable instruments (*m*).

3. A, a solicitor, received rents as agent for his client, and paid them into his own bank to an account headed with the name of the estate. Subsequently, A's private account being overdrawn, he transferred to it the balance of the estate account. Held, that the banker, being aware that A was committing a breach of trust, was liable to repay to the principal the amount so transferred (*n*). Otherwise, if the banker had no notice that the moneys were trust moneys (*o*), or had not known that a breach of trust was being committed (*p*).

### Article 112

RIGHTS AS AGAINST AGENT'S TRUSTEE IN BANKRUPTCY

On the bankruptcy of an agent, the principal is entitled, as against the trustee in bankruptcy and creditors of the bankrupt, to all moneys and property held by the bankrupt, and all outstanding debts due to the bankrupt, as his agent, subject to any lien of the

(*k*) Illustrations 1 to 3. *Lang* v. *Smyth* (1831), 7 Bing. 284 ; 9 L. J. (o.s.) C. P. 91 ; *Rimmer* v. *Webster*, [1902] 2 Ch. 163 ; 71 L. J. Ch. 561 ; *Farquharson* v. *King*, [1902] A. C. 325 ; 71 L. J. K. B. 667, H. L. ; *Gompertz* v. *Cook* (1904), 20 T. L. R. 106. See also Article 87, Illustrations 4 to 7 ; Article 89, Illustrations 1, and 3 to 7.

(*l*) *Fox* v. *Martin* (1895), 64 L. J. Ch. 473 ; *Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267 ; 60 L. J. Ch. 131, H. L. ; *Hutchison* v. *Colorado Mining Co.*, *Hamill* v. *Lilley* (1887), 3 T. L. R. 265, C. A. ; *France* v. *Clark* (1884), 26 Ch. D. 257 ; 53 L. J. Ch. 585, C. A. ; *Tayler* v. *Gt. Indian Ry.* (1859), 28 L. J. Ch. 709 ; 4 De G. & J. 559.

(*m*) *Re European Bank, ex p. Oriental Bank* (1870), L. R. 5 Ch. 358 ; 39 L. J. Ch. 588.

(*n*) *Bodenham* v. *Hoskyns* (1852), 21 L. J. Ch. 864 ; 2 De G. M. & G. 903.

(*o*) *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A. C. 693, P. C.

(*p*) *Shields* v. *Bank of Ireland*, [1901] 1 Ir. R. 222 ; *Bank of New South Wales* v. *Goulburn Valley Butter Factory*, [1902] A. C. 543 ; 71 L. J. P. C. 112. And see Article 137.

bankrupt thereon (*q*). Provided that this principle does not extend to money or goods, or debts due or growing due to the bankrupt in the course of his trade or business, which are, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt in his trade or business (*r*), by the consent and permission of the true owner (*s*), under such circumstances that the bankrupt is the reputed owner thereof (*t*).

Where an agent misapplies the money or property of his principal, the principal is entitled, as against the agent and his trustee in bankruptcy and creditors, to the proceeds of such money or property, of whatsoever nature they may be, provided that they can be clearly traced (*u*).

Where an agent mixes the money or property of his principal with his own, the principal is entitled as against the agent and his trustee in bankruptcy and creditors, to a first charge on the mixed fund or property, or on the proceeds thereof, provided that they can be clearly traced (*a*).

*Reputed Ownership Clause*

The reputed ownership clause applies only where the moneys or goods are in the possession of, or the debts are owing to, the bankrupt under such circumstances that, in the ordinary course of his business, he would obtain delusive credit thereby (*b*).

*Illustrations*

1. Money is paid to a broker by his principal for application in a particular way. The broker pays the money into his own account at a bank, and becomes bankrupt before applying it as directed. The principal is entitled to the money as against the broker's trustee in bankruptcy (*c*). If, in such a case, the agent has drawn on the account, the principal has a charge on the balance

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(*q*) Illustrations 1 to 7. *Ex p. Kelly* (1879), 11 Ch. D. 306 ; 48 L. J. Bk. 65 ; *Farley* v. *Turner* (1857), 26 L. J. Ch. 710 ; *Re Cotton, ex p. Cooke* (1913), 57 S. J. 174 ; *Barber* v. *Rigley* (1922), 38 T. L. R. 650. As to the right to books, etc., relating to the principal's affairs, see *Re Burnand, ex p. Wilson*, [1904] 2 K. B. 68 ; 73 L. J. K. B. 413, C. A.

(*r*) See *Re Jenkinson, ex p. Nottingham Bank* (1885), 15 Q. B. D. 441 ; 54 L. J. Q. B. 601 ; *Re Pryce, ex p. Rensburg* (1877), 4 Ch. D. 685 ; *Brewin* v. *Short* (1855), 24 L. J. Q. B. 297 ; 5 E. & B. 227.

(*s*) See *Ex p. Carlow* (1834), 2 Mont. & A. 39 ; *Smith* v. *Topping* (1833), 3 L. J. K. B. 47 ; 5 B. & Ad. 674 ; *Ex p. Ward, re Couston* (1873), L. R. 8 Ch. 144 ; 42 L. J. Bk. 17.

(*t*) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 38. See *Re Fawcus, ex p. Buck* (1876), 3 Ch. D. 795. And see Illustrations 6 to 8.

(*u*) Illustrations 8 to 10. *Hopper* v. *Conyers* (1866), L. R. 2 Eq. 549.

(*a*) Illustrations 1, 11 and 12. *Re Murray, Dickson* v. *Murray* (1887), 57 L. T. 223. See also *Re Burge, ex p. Skyrme*, [1912] 1 K. B. 393 ; 81 L. J. K. B. 721.

(*b*) *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426 ; 56 L. J. Ch. 43, H. L. ; *Re Watson, ex p. Atkin*, [1904] 2 K. B. 753 ; 73 L. J. K. B. 854, C. A.

(*c*) *Re Strachan, ex p. Cooke* (1876), 4 Ch. D. 123 ; 46 L. J. Bk. 52, C. A. ; *Hancock* v. *Smith* (1889), 41 Ch. D. 456 ; 58 L. J. Ch. 725, C. A. Comp. *Re Hallett, ex p. Blane*, [1894] 2 Q. B. 237 ; 63 L. J. Q. B. 573, C. A. ; *Re Mawson, ex p. Hardcastle* (1881), 44 L. T. 523 ; *King* v. *Hutton*, [1900] 2 Q. B. 504 ; 69 L. J. Q. B. 786, C. A. ; *Wilsons and Furness-Leyland Line* v. *British and Continental Shipping Co.* (1907), 23 T. L. R. 397.

in the banker's hands, the amounts so drawn being deemed to be drawn out of the agent's own moneys, whenever they were paid in (*d*). Where the moneys of several principals have been paid into the account, their charges have priority in the inverse order of the payments, the balance being deemed to consist of the trust moneys most recently paid in (*e*). Where money has been paid by a client to a stockbroker, as agent, for the purchase of shares, and the broker becomes bankrupt, not having delivered the shares, the client is entitled to the return of the money, if it can be followed, as in a case of fiduciary relationship (*f*).

2. An agent becomes bankrupt, it being a matter of notoriety that he acts as an agent. Goods in his hands for sale (*g*), and unmatured bills and notes received by him as the price of goods sold (*h*), must, subject to his lien, be returned to the principal, and may be recovered by him from the trustee in bankruptcy. The price of goods already sold may, subject to the agent's lien, be recovered by the principal from the purchaser (*i*), and if received by the trustee in bankruptcy, may be recovered from him by the principal as money received to his use (*i*).

3. Bills of exchange are paid into a bank, to be collected as they fall due, and the proceeds credited to the account of the customer. The banker becomes bankrupt. The customer is entitled, as against the trustee in bankruptcy, to those bills of which the proceeds have not been received by the banker before the bankruptcy, subject to any lien of the banker (*k*) ; and if the trustee in bankruptcy collect any of the bills, he is liable to the customer for the proceeds or for the value thereof, at the option of the customer (*l*). Otherwise, where the banker discounts the bills, or there is an agreement with the customer that they shall become the property of the banker (*m*). Such an agreement is not, however, to be inferred merely because it is the custom of the banker to credit the amount of the bills as cash immediately they are paid in and to charge interest for the unexpired period (*l*).

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(*d*) *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696 ; 49 L. J. Ch. 415, C. A. ; *Spartali* v. *Crédit Lyonnais* (1886), 2 T. L. R. 178, C. A. ; *Re Wreford, Carmichael* v. *Rudkins* (1897), 13 T. L. R. 153. And see *Société Coloniale Anversoise* v. *London and Brazilian Bank*, [1911] 2 K. B. 1024 ; 80 L. J. K. B. 1361, C. A.

(*e*) *Re Stenning*, [1895] 2 Ch. 433.

(*f*) *Re Wheeler* (1933), 102 L. J. Ch. 341 ; *Re Wreford* (1897), 13 T. L. R. 153.

(*g*) *Scott* v. *Surman* (1742), Willes 400 ; *Re Wood, ex p. Boden* (1873), 28 L. T. 174 ; *Stafford* v. *Clark* (1823), 1 C. & P. 24 ; *Ex p. Dumas* (1754), 1 Atk. 231 ; *Godfrey* v. *Furzo* (1733), 3 P. W. 186 ; *Ex p. Wucherer* (1832), 2 Dea. & Ch. 37 ; *Ex p. Moldaut* (1833), 3 Dea. & Ch. 351 ; *Re Kullberg* (1863), 9 L. T. 460.

(*h*) *Scott* v. *Surman* (1742), Willes 400 ; *Whitecomb* v. *Jacob*, 1 Salk. 160.

(*i*) *Scott* v. *Surman, supra ; Re Wood, Ex p. Boden* (1873), 28 L. T. 174 ; *Ex p. Carlow* (1834), 2 Mont. & A. 39 ; *Burdett* v. *Willett* (1708), 2 Vern. 638 ; *Ex p. Moldaut* (1833), 3 Dea. & Ch. 351.

(*k*) *Giles* v. *Perkins* (1807), 9 East 12 ; *Thompson* v. *Giles* (1824), 3 D. & R. 733 ; *Ex p. Benson* (1832), 1 Dea. & Ch. 435 ; *Ex p. Armitstead* (1828), 2 G. & J. 371 ; *Ex p. Sollers* (1811), 18 Ves. 229 ; *Ex p. Rowton* (1810), 17 Ves. 426. As to instruments payable on demand, see *Re Mills* (1893), 10 M. B. R. 193.

(*l*) *Tennant* v. *Strachan* (1829), 4 C. & P. 31 ; *Giles* v. *Perkins, supra ; Thompson* v. *Giles, supra ; Ex p. Bond* (1840), 1 M. D. & De G. 10 ; *Ex p. Froggatt* (1843), 3 M. D. & De G. 322 ; *Ex p. Edwards* (1842), 2 M. D. & De G. 625. See also *Re Farrow's Bank*, [1923] 1 Ch. 41 ; 92 L. J. Ch. 153, C. A.

(*m*) *Giles* v. *Perkins, supra ; Thompson* v. *Giles, supra ; Re Gothenburg Commercial Co.* (1881), 44 L. T. 166, C. A. ; *Re Broad, ex p. Neck* (1884), 13 Q. B. D. 740 ; 54 L. J. Q. B. 79, C. A. ; *Re Harrison, ex p. Barkworth* (1858), 27 L. J. Bk. 5 ; 2 De G. & J. 194 ; *Carstairs* v. *Bates* (1812), 3 Camp. 301 ; *Dawson* v. *Isle*, [1906] 1 Ch. 633 ; 75 L. J. Ch. 338.

4. Bills are remitted to an agent for a particular purpose. They must be returned to the remitter, if the agent become bankrupt before applying them to such purpose (*n*).

5. A foreign merchant remitted bills to a factor in London, with instructions to sell them. The factor sold and indorsed them in his own name, and became bankrupt before receiving the price. Held, that the principal was entitled to the proceeds, as against the trustee in bankruptcy (*o*).

*Reputed Ownership Clause*

6. Books are left with a publisher for sale in the course of his trade. The books do not pass to his trustee in bankruptcy (*p*). So, where an agent was described, on a brass plate at his place of business and on his invoices, as a merchant and manufacturers' agent, that was held to be sufficient notice of the agency to exclude the operation of the reputed ownership clause of the Bankruptcy Act, and the trustee in bankruptcy was ordered to deliver up to the manufacturers goods of theirs in the hands of the agent and to pay over to them the proceeds of goods which had been sold on their behalf (*q*).

7. Books are deposited with a bookseller for sale on commission, and are kept by him as part of his general stock. It is notorious in the trade that it is customary for booksellers to act as agents for the sale of books on commission. The books are not in his reputed ownership, and on his bankruptcy must be delivered up to the principal (*r*).

8. Malting agents sent in to their principal fictitious accounts of barley alleged to have been bought on his account, and misapplied the money. They subsequently absconded, leaving barley and malt on their premises of less value than the amount misapplied, and became bankrupt. The principal seized the malt and barley. Held, that he was entitled to hold it as against the trustee in bankruptcy. It is notorious that malting agents are, in many instances, not the owners of barley and malt on the malting premises, and it was, therefore, not in the order and disposition of the agents as reputed owners ; and though much of it was bought with their own money, they were estopped, by their representation that they were buying it with the money intrusted to them by the principal, from saying so, and the trustee in bankruptcy was, in this respect, in no better position (*s*).

9. A broker misapplied his principal's money by purchasing stock and bullion, and absconded. He was adjudicated bankrupt on the day upon

(*n*) *Ex p. Oursell* (1756), Ambl. 297 ; *Ex p. Smith* (1819), Buck 355 ; *Ex p. Sayers* (1800), 5 Ves. 169 ; *Jombart* v. *Woollett* (1837), 6 L. J. Ch. 211 ; 2 Myl. & C. 389 ; *Parke* v. *Eliason* (1801), 1 East 544 ; *Zinck* v. *Walker* (1777), W. Bl. 1154 ; *Tooke* v. *Hollingworth* (1793), 5 T. R. 215.

(*o*) *Re Trye, ex p. Pauli* (1838), 3 Dea. 169.

(*p*) *Re Thickbroom, ex p. Greenwood* (1862), 6 L. T. 558.

(*q*) *Re Smith, ex p. Bright* (1879), 10 Ch. D. 566 ; 48 L. J. Bk. 81, C. A.

(*r*) *Whitfield* v. *Brand* (1847), 16 M. & W. 282 ; *Ex p. Poppleton* (1891), 63 L. T. 839 (safes sent to an ironmonger on sale or return) ; *Re Florence, ex p. Wingfield* (1879), 10 Ch. D. 591, C. A. (horses to a horsedealer on sale or return) ; *Re Ford*, [1929] 1 Ch. 137 ; 98 L. J. Ch. 144 (antique furniture sent to a dealer for sale on commission).

(*s*) *Harris* v. *Truman* (1882), 9 Q. B. D. 264 ; 51 L. J. Q. B. 338, C. A. And see *Middleton* v. *Pollock, ex p. Wetherall* (1876), 4 Ch. D. 49 ; 46 L. J. Ch. 39.

which he received and misapplied the money. On being arrested he surrendered the securities for the stock and bullion to the principal. Held, that the principal was entitled to retain the securities as against the trustee in bankruptcy (*t*).

10. A factor, who was intrusted with money to buy indigo, applied it partly to the reduction of a mortgage debt and partly in investments which resulted in profits, and subsequently became bankrupt. Held, that the principal was entitled to the surplus produced by a sale of the mortgaged property, and to the profits realised by the investments, as the proceeds of the money misapplied by the factor, so far as it was possible to trace them (*u*).

*Mixed Property or Fund*

11. An agent, who was intrusted with bills to get discounted, mixed them with his own property, absconded, and became bankrupt. He was arrested with money in his possession which was the produce of portions of the mixed property. Held, that the principal was entitled, in preference to the other creditors, to a first charge on such money for the amount of the bills (*a*).

12. An agent, who was employed to sell certain goods, mixed them with goods of his own, and consigned the whole of the goods together to a factor for sale, representing to his principal that he had sold his goods, and debiting himself with the amount of the supposed prices. The agent having become bankrupt, the principal was held entitled to have the proceeds of the mixed property marshalled, so as to throw advances made by the factor, as far as possible, on the agent's own goods (*b*).

## Article 113

PRIVILEGE FROM DISTRESS OF GOODS AND CHATTELS IN HANDS OF AGENT

Where goods or chattels are intrusted to an agent, who carries on a trade or business in which the public are invited to intrust their goods or chattels to him, for the purpose of being sold or otherwise dealt with in the way of such trade or business, the goods or chattels, while on the premises of the agent, or on other premises hired by him, for any such purpose, are exempt from distress for rent.

*Illustrations*

1. Goods are intrusted to a factor or auctioneer for sale. They are not liable to distress for the rent of the premises of the factor or auctioneer (*c*).

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(*t*) *Taylor* v. *Plumer* (1815), 3 M. & S. 562 ; *Re Hulton, ex p. Manchester Bank* (1891), 39 W. R. 303. And see *Re Dodds, ex p. Brown* (1891), 60 L. J. Q. B. 599.

(*u*) *Re Hammond, ex p. Brooke* (1869), 20 L. T. 547.

(*a*) *Frith* v. *Cartland* (1865), 34 L. J. Ch. 301.

(*b*) *Broadbent* v. *Barlow* (1861), 30 L. J. Ch. 569 ; 3 De G. F. & J. 570 ; *Re Holland, ex p. Alston* (1868), L. R. 4 Ch. 168.

(*c*) *Williams* v. *Holmes* (1853), 8 Ex. 861 ; 22 L. J. Ex. 283 ; *Adams* v. *Grane* (1833), 1 C. & M. 380 ; *Gilman* v. *Elton* (1831), 6 Moo. 243 ; *Findon* v. *McLaren* (1845), 6 Q. B. 891 ; 14 L. J. Q. B. 183.

2. An auctioneer hires a room for the purpose of a sale by auction. Goods or chattels sent to the room for sale are privileged from distress, though the room was hired only for the particular occasion (*d*).

3. A employs an auctioneer to sell goods by auction on A's premises. B sends goods to A's premises, to be sold with A's goods. The goods of both A and B are liable to distress for rent due from A in respect of the premises (*e*).

4. Corn is intrusted to a factor for sale. Not having a warehouse of his own, he deposits the corn in the warehouse of a granary keeper. The corn is privileged from distress for the rent of such warehouse (*f*).

5. A was an agent for the sale of carpets manufactured by B, and the name of B, as well as that of A, was painted outside the premises upon which A carried on business. A also acted as agent for the sale, upon the same premises, of carpets manufactured by C, and was entitled to carry on other agency business, though he did not do so. Held, that the goods of B and C were not exempt from distress for the rent of the premises, because A did not carry on a trade or business in which the public were invited to intrust their goods to him (*g*).

## SECT. 5.—*Bribery of Agent*

### Article 114

RIGHTS OF PRINCIPAL WHERE AGENT BRIBED

Where an agent is induced by bribery to depart from his duty to his principal, the person who bribed the agent is liable, jointly and severally with the agent, to the principal for any loss incurred by him in consequence of the breach of duty, without taking into account the amount of the bribe, or any part thereof that may have been recovered by the principal from the agent as money received to his use (*h*).

Every contract made or act done by an agent under the influence of bribery, or (to the knowledge of the other contracting party) in violation of his duty to his principal, is voidable by the principal (*i*).

(*d*) *Brown* v. *Arundell* (1850), 20 L. J. C. P. 30 ; 10 C. B. 54.
(*e*) *Lyons* v. *Elliott* (1876), 1 Q. B. D. 210 ; 45 L. J. Q. B. 159.
(*f*) *Matthias* v. *Mesnard* (1826), 2 C. & P. 353.
(*g*) *Tapling* v. *Weston* (1883), 1 C. & E. 99.
(*h*) Illustration 1. *Morgan* v. *Elford* (1876), 4 Ch. D. 352 ; *Alexander* v. *Webber*, [1922] 1 K. B. 642 ; 91 L. J. K. B. 320 ; *Jasperson* v. *Dominion Tobacco Co.*, [1923] A. C. 709 ; 92 L. J. P. C. 190, P. C. As to the criminal liability of agents and of persons bribing agents, see Article 59.
(*i*) Illustrations 2 to 4. *Panama Telegraph Co.* v. *India Rubber, etc., Co.* (1875), L. R. 10 Ch. 515 ; 45 L. J. Ch. 121 ; *Odessa Tramways Co.* v. *Mendel* (1877), 8 Ch. D. 235 ; 47 L. J. Ch. 505, C. A. ; *Matthews* v. *Gibbs* (1860), 30 L. J. Q. B. 55 ; *Maxwell* v. *Port Tennant Fuel Co.* (1857), 24 Beav. 495 ; *Bartram* v. *Lloyd* (1904), 90 L. T. 357, C. A. ; *Rowland* v. *Chapman* (1901), 17 T. L. R. 669 ; *Re A Debtor*, [1927] 2 Ch. 367 ; 96 L. J. Ch. 381, C. A.

An agent who has been bribed is conclusively presumed to be influenced by the bribery in doing any act affecting the relations between his principal and the briber (*k*).

The principal may avoid the contract upon discovering the bribery, notwithstanding that he has previously, in ignorance of the bribery, repudiated the contract upon insufficient grounds (*l*).

*Illustrations*

1. An agent contracted, on behalf of a corporation, for a supply of coals, the persons with whom he contracted making him an allowance of 1s. per ton, and charging 1s. per ton more than the market price, to enable them to make the allowance. The corporation, on discovering the bribery, sued the persons who supplied the coals for the amount so overcharged. Held, that the defendants were liable, and that the fact that the agent had deposited with the corporation the amount of the bribe, and the corporation had agreed to allow him what was recovered from the defendants, constituted no defence (*m*).

2. A person who dealt with an agent gave him a gratuity in order to influence him, generally, in favour of the giver. The agent was in fact so influenced in making a contract with the giver on the principal's behalf. Held, that the contract was voidable by the principal, although the gratuity was not given in direct relation to the particular contract (*n*).

3. A agreed to buy a pair of horses from B, provided A's agent certified that they were sound. B secretly offered the agent a certain sum if the horses were sold, and the agent accepted the offer. The agent certified that the horses were sound. Held, that A was not bound by the contract, whether the agent was in fact biased by the offer made to and accepted by him, or not (*o*).

4. A broker, who was employed to sell certain property, sold it, ostensibly to A, really to A and himself. Both A and the broker became insolvent, the goods still being in the broker's possession. Held, that the contract was voidable, and that the principal was entitled to recover the goods as against the broker's trustee in bankruptcy (*p*).

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(*k*) Illustration 3. *Hovenden* v. *Millhoff* (1900), 83 L. T. 41, C. A. But see *Rowland* v. *Chapman* (1901), 17 T. L. R. 669.

(*l*) *Alexander* v. *Webber*, *supra*.

(*m*) *Salford Corporation* v. *Lever*, [1891] 1 Q. B. 168 ; 60 L. J. Q. B. 39, C. A. ; *Grant* v. *Gold Exploration, etc., Syndicate*, [1900] 1 Q. B. 233 ; 69 L. J. Q. B. 150, C. A. ; *Hovenden* v. *Millhoff* (1900), 83 L. T. 41, C. A. Comp. *Lands Allotment Co.* v. *Broad* (1895), 13 R. 699.

(*n*) *Smith* v. *Sorby* (1875), 3 Q. B. D. 522, n. ; *Hough* v. *Bolton* (1885), 1 T. L. R. 606.

(*o*) *Shipway* v. *Broadwood*, [1899] 1 Q. B. 369 ; 68 L. J. Q. B. 360, C. A.

(*p*) *Re Pemberton, ex p. Huth* (1840), Mont. & Ch. 667.

# CHAPTER IX

## RELATIONS BETWEEN AGENTS AND THIRD PERSONS

### SECT. 1.—*Liabilities of Agents in Respect of Contracts Made by them*

### Article 115

PUBLIC AGENTS NOT LIABLE ON CONTRACTS MADE AS SUCH

AT common law, a public agent was not liable to be sued on any contract made by him on behalf of the Crown or government (*a*) ; but he was personally liable where he expressly pledged his personal credit (*b*), or where he contracted otherwise than as an agent of the Crown or government (*b*). Proceedings may now be brought against the authorised government department or the Attorney-General in accordance with the provisions of the Crown Proceedings Act, 1947 (*c*).

Section 1 of the Crown Proceedings Act, 1947, provides as follows : " Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant of His Majesty's fiat, by petition of right, or might have been enforced by a proceeding provided by a statutory provision repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right and without the fiat of His Majesty by proceedings taken against the Crown for that purpose in accordance with the provisions of this Act.

Under section 17 the Treasury has published a list of government departments which are authorised for the purposes of the Act (*d*).

*Illustrations*

1. A colonial governor who orders goods which are supplied and debited to the government is not liable on the contract (*e*).

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(*a*) Illustrations 1 and 2. *Palmer* v. *Hutchinson* (1881), 6 App. Cas. 619 ; 50 L. J. P. C. 62, P. C. ; *Prosser* v. *Allen* (1819), Gow. 117. Nor is he liable upon an implied warranty of authority : *Dunn* v. *Macdonald*, [1897] 1 Q. B. 555 ; 66 L. J. Q. B. 420, C. A. The remedy upon the contract was by petition of right : see Article 90. The rule as to immunity from suit of public agents probably applies even where the contract is under seal, provided that it is expressed to be made on behalf of the government : *Unwin* v. *Wolseley* (1787), 1 T. R. 674. See *contra* : *Cunningham* v. *Collier* (1785), 4 Doug. 233.

(*b*) Illustrations 3 to 5. *Prosser* v. *Allen* (1819), Gow. 117.

(*c*) 10 & 11 Geo. 6, c. 44.

(*d*) See also Articles 90 and 101.

(*e*) *Macbeath* v. *Haldimand* (1786), 1 T. R. 172 ; *Kenny* v. *Cosgrave*, [1926] Ir. R. 517.

2. Orders were given for forage to be supplied to a troop, by a clerk who was appointed by the captain of the troop. Held, that the captain was not liable for the price of the forage (*f*).

3. A naval commander, when employing a cook, undertook to pay him a certain sum per annum in addition to the government pay. Held, that the commander was personally liable to pay such additional sum, he having contracted personally, and not as an agent for the government (*g*).

4. A clerk of a county court gave orders for the fitting up, etc., of the court-house. Held, that it was properly left to the jury to say whether he had contracted personally, and that, if he had, he was personally liable on the contract (*h*).

5. The Commissioners of Public Works and Buildings entered into a contract with certain builders for the erection of public buildings. It was held that the Commissioners must be taken to have contracted for themselves, and not merely as agents of the Crown, and that they were liable to be sued by the builders for damages for breach of the contract (*i*).

## Article 116

AGENT LIABLE IF HE CONTRACT PERSONALLY, BUT NOT IF HE CONTRACT MERELY AS AN AGENT

Every agent who contracts personally, though also on behalf of his principal, is personally liable, and may be sued in his own name, on the contract, whether the principal be named therein, or be known to the other contracting party, or not (*k*), and either the principal or agent may be sued, unless the other contracting party elect to give exclusive credit to the principal (*l*). But no agent is personally liable on any contract made by him merely in his capacity of an agent, even if he make it fraudulently, knowing that he has not authority to do so (*m*).

The question whether an agent who has made a contract on behalf of his principal is to be deemed to have contracted personally,

(*f*) *Rice* v. *Chute* (1801), 1 East 579.

(*g*) *Clutterbuck* v. *Coffin* (1842), 11 L. J. C. P. 65 ; 3 M. & G. 842.

(*h*) *Auty* v. *Hutchinson* (1848), 17 L. J. C. P. 304 ; 6 C. B. 266.

(*i*) *Graham* v. *Public Works Commrs.*, [1901] 2 K. B. 781 ; 70 L. J. K. B. 860 ; *Roper* v. *Public Works Commrs.*, [1915] 1 K. B. 45 ; 84 L. J. K. B. 219.

(*k*) Illustrations 1 to 12. *Reid* v. *Dreaper* (1861), 30 L. J. Ex. 268 ; 6 H. & N. 813 ; *Turrel* v. *Collet* (1795), 1 Esp. 320 ; *Watson* v. *Murrel* (1824), 1 C. & P. 307 ; *Scrace* v. *Whittington* (1823), 3 D. & R. 195. See also *Basma* v. *Weekes*, [1950] 2 All E. R. 146 ; and §§ 320 to 322, 328 of the American Restatement. A director or officer who enters into a written contract on behalf of a limited company is personally liable on the contract if it does not contain the name of the company together with the word "limited", as required by the Companies Act, 1948 (11 & 12 Geo. 6, c. 38), ss. 2, 389. See *Dermatine Co.* v. *Ashworth* (1905), 21 T. L. R. 510.

(*l*) See *Ex p. Pitt* (1923), 40 T. L. R. 5, C. A. ; *Gardiner* v. *Heading*, [1928] 2 K. B. 284 ; 97 L. J. K. B. 766, C. A.

(*m*) Illustrations 5, 13 to 15. *Wilson* v. *Bury* (1880), 5 Q. B. D. 518 ; 50 L. J. Q. B. 90, C. A. ; *Russel* v. *Reece* (1847), 2 C. & K. 669. He may be liable on an implied warranty of authority, see Article 123.

and if so, the extent of his liability on the contract (*n*), depend on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances (*o*) including any binding custom (*p*).

Where a home agent contracts in England or Wales, on behalf of a foreign principal, he is presumed to contract personally, unless a contrary intention plainly appear from the terms of the contract or the surrounding circumstances (*q*).

*Auctioneers*

Where an auctioneer sells property by auction, the nature and extent of his contract with the purchaser depend upon the conditions of sale, the nature of the subject-matter, and the other surrounding circumstances (*r*). Thus, in the case of a sale of standing corn with straw, to be removed at the purchaser's expense, it was held that the auctioneer contracted to give proper authority to enter and carry away the corn and straw, and undertook that he was in fact authorised to sell, but that he did not warrant the title (*r*). Upon a sale of shares, which required transfer by deed, the auctioneers, who were acting on behalf of an un-named principal, were held liable in damages, for failing to procure a transfer of the shares, upon the ground that they had agreed so to do (*s*). Where, however, an auctioneer sells a specific chattel by auction, he is not liable upon the contract of sale, nor does he impliedly warrant the title of his principal, although the name of the principal has not been disclosed to the buyer (*t*). In such a case, he impliedly warrants that he has authority to sell and that he knows of no defect in the title of his principal ; and he undertakes to deliver the chattel in exchange for the price (for which he may sue) ; but his contract with the buyer is independent of the contract of sale, which he makes on behalf of the seller and to which he is not a party (*t*).

Where a sale by auction is advertised as being " without reserve," the auctioneer impliedly contracts to accept the offer of the highest *bona fide* bidder, and is liable to him in damages for breach of such implied contract if he accept a bid from the vendor (*u*). But an advertisement to the effect that certain goods will be sold on certain days does not amount to a contract

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(*n*) See below.

(*o*) Illustrations 1 to 13 ; and see Articles 117 to 124.

(*p*) *Thornton* v. *Fehr* (1935), 51 Ll. L. Rep. 330.

(*q*) *Hutton* v. *Bulloch* (1874), L. R. 9 Q. B. 572, Ex. Ch. ; *Dramburg* v. *Pollitzer* (1873), 28 L. T. 470 ; *Elbinger, etc.* v. *Claye* (1873), L. R. 8 Q. B. 313 ; 42 L. J. Q. B. 151 ; *Reynolds* v. *Peapes* (1890), 6 T. L. R. 49 ; *Peterson* v. *Ayre* (1853), 13 C. B. 353 ; *Harper* v. *Keller* (1915), 84 L. J. K. B. 1696 ; *Brandt* v. *Morris*, [1917] 2 K. B. 784, C. A. See Article 119 for rules of construction, where the contract is in writing.

(*r*) *Wood* v. *Baxter* (1883), 49 L. T. 45.

(*s*) *Franklyn* v. *Lamond* (1847), 4 C. B. 637 ; 16 L. J. C. P. 221 ; *Hanson* v. *Roberdeau* (1792), 1 Peake 163.

(*t*) *Benton* v. *Campbell*, [1925] 2 K. B. 410 ; 94 L. J. K. B. 881.

(*u*) *Warlow* v. *Harrison* (1858), 1 El. & El. 295, 309 ; 29 L. J. Q. B. 14, Ex. Ch. ; *Heatley* v. *Newton* (1881), 19 Ch. D. 326 ; 51 L. J. Ch. 225, C. A. Comp. *Mainprice* v. *Westley* (1865), 34 L. J. Q. B. 229 ; 6 B. & S. 420 ; *Rainbow* v. *Howkins*, [1904] 2 K. B. 322 ; 73 L. J. K. B. 641 ; *McManus* v. *Fortescue*, [1907] 2 K. B. 1 ; 76 L. J. K. B. 393, C. A.

to so sell them, so as to entitle a person who acts on the advertisement to recover damages for loss of time or expenses if the goods are not put up (*a*).

*Liability may be Expressly Limited*

Where an agent contracts personally, his liability under the contract may be expressly restricted to certain events. Thus where a clause in a charter-party provided that the liability of the agent as to all matters—as well before as after the shipping of the cargo—should cease as soon as the cargo was shipped, it was held that he was not personally liable for demurrage at the port of discharge (*b*).

*Stock Exchange Rule*

By the rules of the Stock Exchange a buying broker is personally liable to the seller if he fail to give the name of a responsible transferee, and the fact that he acts for both buyer and seller does not affect this liability (*c*).

*Illustrations*

1. A acted as the London agent of C & Co., who were paper manufacturers in Vienna. B, by letter, ordered paper from A, who in his own name acknowledged the letter, and promised to supply the paper in certain quantities at certain times. A portion of the paper was delivered, and on B complaining to A respecting the non-delivery of the remainder, A stated that it was the default of C & Co. B then wrote to C & Co. telling them of the position of affairs, and the excuses made by A. Subsequently B sued A for breach of contract. Held, that A, having contracted personally, was liable, and that B's letter to C & Co. did not amount to an election by B to substitute C & Co. for A as the contracting parties. Some weight was attached to the circumstance that the principals were foreigners (*d*).

2. A solicitor in his own name contracted to buy certain freehold property. Held, that he was personally liable, although he was, in fact, acting on behalf of a client (*e*). So, where a solicitor bought property at a sale by auction, he was held personally liable for the deposit, though he openly declared that he was bidding as trustee for a client (*f*). Where solicitors instructed stock-brokers to sell stock belonging to A, and enclosed a blank transfer signed by A, it was held that the instructions to sell were given by the solicitors as principals (*g*).

3. An agent signed in his own name, without mentioning his principal, an undertaking to accept shares in a company, and the shares were allotted

(*a*) *Harris* v. *Nickerson* (1873), L. R. 8 Q. B. 286 ; 42 L. J. Q. B. 171.
(*b*) *Oglesby* v. *Yglesias* (1858), 27 L. J. Q. B. 356 ; E. B. & E. 930 ; *Milvan* v. *Perez* (1861), 30 L. J. Q. B. 90 ; 3 E. & E. 495. Comp. *Christoffersen* v. *Hansen* (1872), L. R. 7 Q. B. 509 ; 41 L. J. Q. B. 217 ; *Lister* v. *Van Haansbergen* (1876), 1 Q. B. D. 269 ; 45 L. J. Q. B. 495 ; *Gullischen* v. *Stewart* (1884), 13 Q. B. D. 317 ; 53 L. J. Q. B. 173, C. A. ; *Clink* v. *Radford*, [1891] 1 Q. B. 625 ; 60 L. J. Q. B. 338, C. A.
(*c*) Illustration 10.
(*d*) *Dramburg* v. *Pollitzer* (1873), 28 L. T. 470.
(*e*) *Saxon* v. *Blake* (1861), 29 Beav. 438.
(*f*) *Hobhouse* v. *Hamilton* (1826), 1 Hog. 401, Ir.
(*g*) *Hichens* v. *Jackson*, [1943] A. C. 266, cited *ante*, p. 201.

to him. Subsequently, the principal took a larger number of shares, in satisfaction, as the agent said, of his undertaking. Held, that the agent, having personally accepted the shares, was liable as a contributory (*h*).

4. An agent buys goods at a sale by auction, and gives his own name, which is entered as that of the buyer. He is personally liable, unless it be clearly proved that he did not intend to bind himself, and that the auctioneer knew that (*i*).

5. An agent verbally orders goods on behalf of his principal. He is personally liable, unless the seller knows that he is contracting merely as an agent (*k*). But he is not liable if he orders the goods in the principal's name, and credit is given to the principal, or if he tell the seller that he does not intend to be personally responsible (*l*).

6. A broker sent a contract note in his own name, and afterwards a corrected one in the name of the principal, the buyer receiving both notes together. Held, that it was a question for the jury whether he intentionally sent the first contract note in his own name, or sent it merely by mistake, and that if he sent it intentionally, he could not, having contracted personally, afterwards discharge himself by setting up the agency, even if he were known to be a broker when he made the contract (*m*).

7. A and B, on behalf of themselves and other members of a club, order supplies for the use of the club. A and B are personally liable on the contract, and it is not necessary to join the other members as defendants (*n*).

8. A bill of lading whereby goods are deliverable to " the consignee or his assigns, he or they paying freight", is indorsed by the consignee to his agent for sale. The agent takes delivery under the bill of lading as assignee thereof, sells the goods, and pays the proceeds to his principal. The agent is personally liable on an implied contract to pay the freight (*o*).

9. A broker sells debentures in his own name without disclosing his principal, and sends to the buyer what purports to be a transfer signed by the principal and two other persons. The names of the two other persons were forged by the principal, and they compel the buyer to give up the debentures. The broker is personally liable to repay to the buyer the sum paid by him for the debentures (*p*).

10. A stockbroker, being instructed to sell shares, and being unable to sell them on the Stock Exchange, sold them outside to an infant, and made out bought and sold notes, acting for both buyer and seller. The shares were

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(*h*) *Ex p. Bird* (1864), 33 L. J. Bk. 49 ; 4 De G. J. & S. 200.

(*i*) *Williamson* v. *Barton* (1862), 31 L. J. Ex. 170 ; 7 H. & N. 899 ; *Chadwick* v. *Maden* (1851), 9 Hare 188.

(*k*) *Seaber* v. *Hawkes* (1831), 5 M. & P. 549. See p. 258, *post*.

(*l*) *Ex p. Hartop* (1806), 12 Ves. 352 ; *Johnson* v. *Ogilby* (1734), 3 P. Wms. 277 ; *Owen* v. *Gooch* (1797), 2 Esp. 567 ; *Bonfield* v. *Smith* (1844), 12 M. & W. 405.

(*m*) *Magee* v. *Atkinson* (1837), 2 M. & W. 440 ; 6 L. J. Ex. 115.

(*n*) *Cullen* v. *Queensbury* (1781), 1 Bro. P. C. 396, H. L. ; and see *Bradley Egg Farm, Ltd.* v. *Clifford*, [1943] 2 All E. R. 378, C. A., cited *ante*, p. 13.

(*o*) *Bell* v. *Kymer* (1814), 5 Taunt. 477 ; *Dougal* v. *Kemble* (1826), 3 Bing. 383. Comp. *Amos* v. *Temperley* (1841), 8 M. & W. 798 ; *Wilson* v. *Kymer* (1813), 1 M. & S. 157 ; *Ward* v. *Felton* (1801), 1 East 407 ; *Steel* v. *Houlder* (1887), 3 T. L. R. 300, C. A.

(*p*) *Royal Exchange Ass.* v. *Moore* (1863), 8 L. T. 242 ; *Gurney* v. *Womersley* (1854), 24 L. J. Q. B. 46 ; 4 E. & B. 133.

sold subject to the rules of the Stock Exchange. It was held that, the transferee being an infant, the broker was liable to indemnify the seller against all liability in respect of the shares (*q*).

*Auctioneers*

11. An auctioneer sold goods on behalf of a disclosed principal, the conditions of sale providing that the lots should be cleared within three days, and that if from any cause the auctioneer was unable to deliver, etc., the purchaser should accept compensation. Held, that the auctioneer, being in possession of the goods, and having contracted to deliver, was personally liable to the purchaser for non-delivery (*r*).

*Shipmasters*

12. A shipmaster signs a bill of lading, and by mistake delivers the wrong goods to the consignee. He is personally liable in an action for not delivering the goods pursuant to the bill of lading (*s*). So, a shipmaster is personally liable to the seamen for their wages (*t*).

*Not Liable if He Contract Merely as an Agent*

13. A solicitor is *prima facie* not personally liable for the expenses of skilled or other witnesses retained or subpœnaed by him (*u*). Nor is he personally liable for sheriff's fees merely because, in the course of his duty, he lodges a writ at the sheriff's office for execution (*a*). In such matters he is deemed to act merely as the agent of his client, unless he expressly pledges his personal credit (*a*). But a solicitor who employs a particular bailiff to levy execution is *prima facie* personally liable to such bailiff for the fees, it being the usual course of business for the solicitor to pledge his personal credit in such a case (*b*).

14. A married woman living with her husband, and having no separate property, orders necessaries, with the authority of her husband, nothing being said by her, and no enquiries being made by the tradesman, as to whether she is pledging her husband's credit, or contracting on her own behalf. She must be taken to have contracted as the agent of her husband, and is not personally liable (*c*), the decision of an equally divided House of Lords.

15. A professes to contract as an agent for B, the terms of the contract being such as to exclude any supposition of an intention by A to be personally

(*q*) *Queensland Investment Co.* v. *O'Connell* (1896), 12 T. L. R. 502.

(*r*) *Woolfe* v. *Horne* (1877), 2 Q. B. D. 355 ; 46 L. J. Q. B. 534 ; *Williams* v. *Millington* (1788), 1 H. Bl. 81.

(*s*) *Bradley* v. *Dunipace* (1862), 32 L. J. Ex. 22, Ex. Ch. But see *Parsons* v. *New Zealand Shipping Co.*, [1901] 1 K. B. 548 ; 70 L. J. K. B. 404.

(*t*) *The Salacia* (1863), 32 L. J. Adm. 41 ; *Buck* v. *Rawlinson* (1704), 1 Bro. P. C. 137. As to his liability for repairs, etc., ordered by him, see *Essery* v. *Cobb* (1832), 5 C. & P. 358.

(*u*) *Robins* v. *Bridge* (1837), 7 L. J. Ex. 49 ; 3 M. & W. 114 ; *Lee* v. *Everest* (1857), 26 L. J. Ex. 334 ; 2 H. & N. 285. And see *Wakefield* v. *Duckworth*, [1915] 1 K. B. 218 ; 84 L. J. K. B. 335 (order for photographs to be used in connection with a trial).

(*a*) *Royle* v. *Busby* (1880), 6 Q. B. D. 171 ; 50 L. J. Q. B. 196, C. A. ; following *Maybery* v. *Mansfield* (1846), 9 Q. B. 754 ; *Seal* v. *Hudson* (1847), 4 D. & L. 760, and overruling *Brewer* v. *Jones*, 10 Ex. 655.

(*b*) *Newton* v. *Chambers* (1844), 13 L. J. Q. B. 141 ; 1 D. & L. 869 ; *Maile* v. *Mann* (1848), 2 Ex. 608 ; *Langridge* v. *Lynch* (1876), 34 L. T. 695.

(*c*) *Paquin* v. *Beauclerk*, [1906] A. C. 148 ; 75 L. J. K. B. 395, H. L.

liable. A is not liable on the contract, even if he made it fraudulently, knowing that he had no authority from B (*d*), unless he is shown to be the real principal (*e*); but he may be liable for breach of an implied warranty that he had B's authority to make the contract (*f*).

## Article 117

LIABILITY ON CONTRACTS UNDER SEAL

Where an agent is a party to a deed and executes it in his own name, he is personally liable thereon, even when he is described in the deed as acting for and on behalf of a named principal (*g*).

*Illustrations*

1. A, on behalf of B, contracted by deed to purchase certain houses, and covenanted that he (A) would pay £800 for them. The houses were destroyed. Held, that A was personally liable to pay the £800, although he had no effects in his hands belonging to B (*h*). If A covenant under his own hand and seal for the act of B, A is personally liable, though he describe himself as covenanting for and on behalf of B (*i*).

2. The directors of a company contracted by deed to purchase a mine, the price to be paid in twelve months out of moneys raised by the company, with a proviso that if the directors should not by that time have received sufficient deposits from shareholders, etc., to enable them to pay, they should be allowed a further six months for payment. And the directors covenanted that they would, " out of the said payments so to be made by subscribers or shareholders in the said company," pay, according to the terms specified and subject to the said proviso. Held, that they were personally liable for the price, at the end of the eighteen months (*j*).

3. A mortgagee by deed contracted for a tenancy of the mortgaged property, the contract being expressed to be made between the mortgagee " as agent, hereinafter called the landlord," and the tenant. Held, that it was a question of construction who was the lessor, and on the true construction the contract was that of the mortgagee, and that the mere use of the words " as agent " was not sufficient to prevent the demise operating on the legal estate of the mortgagee (*k*).

## Article 118

LIABILITY ON BILLS OF EXCHANGE, PROMISSORY NOTES AND CHEQUES

No agent is personally liable on any bill of exchange, promissory note, or cheque, unless his name appear thereon (*l*)—

(*d*) *Lewis* v. *Nicholson* (1852), 18 Q. B. 503 ; 21 L. J. Q. B. 311 ; 88 R. R. 683 ; *Jenkins* v. *Hutchinson* (1849), 13 Q. B. 744 ; 18 L. J. Q. B. 274.
(*e*) See Article 123.
(*f*) See Article 125.
(*g*) See also § 325 of the American Restatement.
(*h*) *Cass* v. *Rudele* (1692), 2 Vern. 280, H. L.
(*i*) *Appleton* v. *Binks* (1804), 5 East 148.
(*j*) *Hancock* v. *Hodgson* (1827), 12 Moore 504.
(*k*) *Chapman* v. *Smith*, [1907] 2 Ch. 97 ; 76 L. J. Ch. 394.
(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23. See § 324 of the American Restatement.

(a) Where a bill of exchange is drawn on an agent in his own name and is signed by him, he is personally liable as acceptor, even if he add words to the signature, indicating that he signs for and on behalf of a principal, or as an agent (*m*).

(b) Where a bill of exchange is drawn on a principal, the agent is not liable as acceptor, even if he sign his own name without qualification (*n*).

(c) Where an agent signs a bill of exchange, promissory note, or cheque, otherwise than as acceptor of a bill of exchange, he is personally liable, unless he qualify the signature by adding words thereto, indicating that he signs for and on behalf of a principal, or as an agent. If he so qualify the signature, he is not personally liable (*o*).

By s. 26 (1) of the Bills of Exchange Act, 1882, the mere addition to the name or signature of an agent on a bill of exchange, promissory note, or cheque, of words describing him as an agent, does not exempt him from personal liability on the instrument, whether the principal is named therein or not (*p*) ; the section has no application where the endorser merely signs his name (*q*).

Where an agent signs in a trade or assumed name he is liable as if he had signed in his own name ; and the signature of the name of a firm is equivalent to the signature of all persons liable as partners (*l*).

An agent is under an obligation, as such, to indorse a bill. He may indorse it in such terms as to negative personal liability (*r*), but merely describing himself as an agent for a named principal is not sufficient for that purpose (*r*).

*Illustrations*

*Liability as Acceptors*

1. A bill expressed to be " for value received in machinery supplied the adventurers in H mines", was drawn on W. Charles, who wrote across it, " Accepted, for the Company ; W. Charles, purser". Held, that W. Charles was personally liable as acceptor (*s*).

2. A bill was directed to " Messrs. J. and S., joint managers of R. M. M. A. Association", and was accepted "J. J., W. S., as joint managers of R. M. M. A. Association". Held, that J. J. and W. S. were personally liable as acceptors, because, though they were described as agents, the bill was drawn on them

(*m*) Illustrations 1 and 2. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 ; *Herald* v. *Connah* (1876), 34 L. T. 885 ; *Thomas* v. *Bishop* (1743), 2 Str. 955.

(*n*) Illustration 3. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 ; *Polhill* v. *Walter* (1832), 3 B. & Ad. 114.

(*o*) Illustrations 4 to 10. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (1) ; *Ex p. Buckley* (1845), 14 M. & W. 469.

(*p*) Illustrations 2, 8, 9. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (1) ; *Landes* v. *Marcus* (1909), 25 T. L. R. 478.

(*q*) *Britannia Electric Lamp Works, Ltd.* v. *Mandler & Co., Ltd.*, [1939] 2 K. B. 129 ; 108 L. J. K. B. 823.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (1). *Elliott* v. *Bax-Ironside*, [1925] 2 K. B. 301 ; 94 L. J. K. B. 807.

(*s*) *Mare* v. *Charles* (1856), 25 L. J. Q. B. 119 ; 5 E. & B. 978.

personally (*t*). So, where a bill was directed "A B, purser, W. D. Mining Company", and was accepted "A B, *per proc.* W. D. Mining Company", A B was held personally liable as acceptor (*u*).

3. A bill is directed to a company, and is accepted by the directors in their own names, without qualification. The directors are not liable as acceptors (*x*).

*Liability as Drawer or Indorser*

4. An agent draws a bill in his own name. He is personally liable as drawer, even to a holder who knows that he is merely an agent, unless words are added to the signature, indicating that he signs merely as an agent (*a*).

5. A shipmaster draws a bill on his owners in payment for necessaries, the bill concluding with the words "value received in 300 tons coal and disbursements . . . supplied to my vessel to enable her to complete her voyage . . . for which I hold my vessel, owners and freight responsible". The master is personally liable as drawer, there being nothing in the concluding words excluding such liability (*b*).

6. An agent draws a bill in the name of his principal. The agent is not liable on the bill as drawer (*c*).

*Promissory Notes*

7. The trustees of a building society were held personally liable on a promissory note in the following terms: "On demand, we promise to pay A B £200 for the S G Provident Building Society"; (signed) "C D, E F, G H, trustees, I J, secretary" (*d*).

8. Directors have been held personally liable on promissory notes in the following forms:—

(a) "We, directors of A B Company, Limited, do promise to pay J D, etc."; sealed and signed by four directors without qualification (*e*).

(b) "We, directors of A B Company, for ourselves and other shareholders of the company, jointly and severally promise to pay, etc., on account of the company"; signed without qualification (*f*).

(c) "We jointly and severally promise, etc., for and on behalf of, etc." Jointly and severally is equivalent to jointly and personally (*g*).

(d) "We jointly promise to pay J F, etc."; signed by directors without qualification (*h*).

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(*t*) *Jones* v. *Jackson* (1870), 22 L. T. 828.
(*u*) *Nicholls* v. *Diamond* (1853), 9 Ex. 154; 34 L. J. Ex. 1.
(*x*) *Okell* v. *Charles* (1876), 34 L. T. 822, C. A.; *Dermatine Co.* v. *Ashworth* (1905), 21 T. L. R. 510.
(*a*) *Leadbitter* v. *Farrow* (1816), 5 M. & S. 345; *Sowerby* v. *Butcher* (1834), 4 Tyr. 320; *Kettle* v. *Dunster* (1927), 43 T. L. R. 770.
(*b*) *The Elmville, Ceylon Coaling Co.* v. *Goodrich*, [1904] P. 319; 73 L. J. P. 104.
(*c*) *Wilson* v. *Barthrop* (1837), 2 M. & W. 863.
(*d*) *Allan* v. *Miller* (1870), 22 L. T. 825; *Price* v. *Taylor* (1860), 29 L. J. Ex. 331; 5 H. & N. 540.
(*e*) *Dutton* v. *Marsh* (1871), L. R. 6 Q. B. 361; 40 L. J. Q. B. 175; *Courtauld* v. *Saunders* (1867), 16 L. T. 562.
(*f*) *Penkivil* v. *Connell* (1850), 5 Ex. 381; 19 L. J. Ex. 305.
(*g*) *Healey* v. *Storey* (1848), 3 Ex. 3; 18 L. J. Ex. 8; *Bottomley* v. *Fisher* (1862), 31 L. J. Ex. 417; 1 H. & C. 211.
(*h*) *Fox* v. *Frith* (1842), 10 M. & W. 131; *Gray* v. *Raper* (1866), L. R. 1 C. P. 694.

9. The secretary of a company signed a note in the following form :—" I promise to pay, etc." ; (signed) " For M T and W Railway Company, J S, secretary". Held, that he was not personally liable (*i*).

10. A note in the following form was signed by directors, and sealed with the common seal of the society :—" We, two directors of A B Society, by and on behalf of the said society, do hereby promise, etc." ; (signed) " C D. E F, directors ". Held, that C D and E F were not personally liable (*k*), The result was the same where D M, a director, signed an acceptance :— " Accepted . . . D M & Co. Ltd., D M, managing director " (*l*).

## Article 119

### OTHER WRITTEN CONTRACTS

The question whether the agent is to be deemed to have contracted personally, in the case of a contract in writing other than a bill of exchange, promissory note, or cheque, depends upon the intention of the parties, as appearing from the terms of the written agreement as a whole, the construction whereof is a matter of law for the Court (*m*)—

(a) if the contract be signed by the agent in his own name without qualification, he is deemed to have contracted personally, unless a contrary intention plainly appear from other portions of the document (*n*) ;

(b) if the agent add words to his signature, indicating that he signs as an agent, or for or on behalf of a principal, he is deemed not to have contracted personally, unless it plainly appear from other portions of the document, that, notwithstanding such qualified signature, he intended to bind himself (*o*) ;

(c) the mere fact that the agent is described as an agent, whether by words connected with or forming part of the signature, or in the body of the contract, and whether the principal

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(*i*) *Alexander* v. *Sizer* (1869), L. R. 4 Ex. 102 ; 38 L. J. Ex. 59.

(*k*) *Aggs* v. *Nicholson* (1856), 1 H. & N. 165 ; *Lindus* v. *Melrose* (1858), 27 L. J. Ex. 326 ; 3 H. & N. 177, Ex. Ch. ; *Chapman* v. *Smethurst*, [1909] 1 K. B. 927 ; 78 L. J. K. B. 654, C. A.

(*l*) *Britannia Electric Lamp Works, Ltd.* v. *Mander & Co., Ltd.*, [1939] 2 K. B. 129 ; 107 L. J. K. B. 823.

(*m*) Illustrations 1 to 4. *Spittle* v. *Lavender* (1821), 5 Moo. 270 ; 23 R. R. 508 ; *Bowes* v. *Shand* (1877), 2 App. Cas. 455 ; 46 L. J. Q. B. 561. See §§ 327 and 154 to 158 of the American Restatement.

(*n*) Illustrations 5 to 7. *Dutton* v. *Marsh* (1871), L. R. 6 Q. B. 361 ; 40 L. J. Q. B. 175 ; *Hick* v. *Tweedy* (1890), 63 L. T. 765 ; *Hough* v. *Manzanos* (1879), 4 Ex. D. 104 ; 48 L. J. Ex. 398 ; *Cooke* v. *Wilson* (1856), 26 L. J. C. P. 15 ; 1 C. B. (N.S.) 153 ; *Paice* v. *Walker* (1870), L. R. 5 Ex. 173 ; 39 L. J. Ex. 109 ; *Chadwick* v. *Maden* (1851), 9 Hare 188 ; *Stewart* v. *Shannessy* (1900), 2 F. 1288 ; *Beightheil* v. *Stewart* (1900), 16 T. L. R. 177 ; *Morley* v. *Makin* (1906), 54 W. R. 395.

(*o*) Illustrations 8 to 10. *Green* v. *Kopke* (1856), 25 L. J. C. P. 297 ; 18 C. B. 549 ; *Mahony* v. *Kekulé* (1854), 23 L. J. C. P. 54 ; 14 C. B. 390 ; *Hahn* v. *North German Pitwood Co.* (1892), 8 T. L. R. 557.

be named or not, raises no presumption that the agent did not intend to contract personally (*p*).

This article extends to cases where the contract is made on behalf of a foreign principal (*q*).

Effect should be given to every word used and none should be rejected unless it is apparent that they have been introduced *per incuriam*.

*Illustrations*

1. An agent entered into a written agreement to grant a lease of certain premises. He was described in the agreement as making it on behalf of the principal, but in a subsequent portion of the document it was provided that he (the agent) would execute the lease. Held, that the agent was personally liable for a breach of the agreement, though the premises belonged to the principal (*r*).

2. The directors of a company signed a contract in the following terms :— " We, the undersigned, three of the directors, agree to repay £500 advanced by A to the company," and at the same time assigned to A, as security, certain property belonging to the company. Held, that the directors were personally liable (*s*). But where an agent signed a contract in the following form—" I undertake, on behalf of A (the principal), to pay, etc.," it was held that he was not personally liable (*t*).

3. A broker sent a contract note in the following terms :—" Messrs. S.— I have this day sold by your order and for your account to my principal, etc., one per cent. brokerage " ; (signed) " W A B ". Held, that W A B was not personally liable in an action for goods sold (*u*).

4. A solicitor wrote—" I hereby undertake to pay on behalf of these creditors (his clients) two-thirds " of certain expenses. Held, that he was personally liable (*x*). So, the solicitor of the assignees of a bankrupt tenant was held personally liable on an undertaking as follows :—" I, as solicitor to the assignees, undertake to pay the landlord his rent, provided it do not exceed the value of the effects distrained " (*y*).

5. A charterparty was expressed to be made between A B and C D, agent for E F & Son, and was signed by C D, without qualification. Held, that C D was personally liable, though the principals were named, there being

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(*p*) Illustration 5. *Paice* v. *Walker*, *supra*, note (*n*) ; *Hutcheson* v. *Eaton* (1884), 13 Q. B. D. 861, C. A. ; *Hopcroft* v. *Parker* (1867), 16 L. T. 561.

(*q*) Illustration 7. *Glover* v. *Langford* (1892), 8 T. L. R. 628 ; *Reynolds* v. *Peapes* (1890), 6 T. L. R. 49 ; *Hahn* v. *North German Pitwood Co.*, *supra* ; *Green* v. *Kopke*, *supra* ; *Mahony* v. *Kekulé*, *supra* ; *Miller* v. *Smith*, [1917] 2 K. B. 141 ; 86 L. J. K. B. 1259, C. A. ; *Mercer* v. *Wright* (1917), 33 T. L. R. 343.

(*r*) *Norton* v. *Herron* (1825), 1 C. & P. 648 ; *Tanner* v. *Christian* (1855), 24 L. J. Q. B. 91 ; 4 E. & B. 591.

(*s*) *McCollin* v. *Gilpin* (1881), 6 Q. B. D. 516, C. A.

(*t*) *Downman* v. *Williams* (or *Jones*) (1845), 7 Q. B. 103 ; 14 L. J. Q. B. 226 ; 68 R. R. 413, Ex. Ch. ; *Avery* v. *Charlesworth* (1914), 31 T. L. R. 52, C. A.

(*u*) *Southwell* v. *Bowditch* (1876), 1 C. P. D. 374 ; 45 L. J. C. P. 630, C. A.

(*x*) *Hall* v. *Ashurst* (1833), 1 C. & M. 714 ; *Iveson* v. *Conington* (1823), 1 B. & C. 160. Comp. *Allaway* v. *Duncan* (1867), 16 L. T. 264.

(*y*) *Burrell* v. *Jones* (1819), 3 B. & A. 47 ; *Harper* v. *Williams* (1843), 4 Q. B. 219 ; 12 L. J. Q. B. 227.

nothing in the terms of the contract clearly inconsistent with an intention to contract personally (*z*).

6. An agent was described in a contract as "consignee and agent on behalf of Mr. M, of L," and it was stated that "the said parties agreed," etc., the contract being signed by the agent in his own name without qualification. Held, that the agent was personally liable (*a*).

7. An agent signed, without qualification, a contract in the following form: "Sold A B 200 quarters wheat (as agent for C F & Co., Dantzig)". Held, that the words, "as agent for C F & Co., Dantzig," in the body of the contract, did not clearly show that the agent did not intend to contract personally; and that, as he had signed it without qualification, he was personally liable (*b*). This was a unanimous decision of the Court of Exchequer; but it was disapproved by James, L.J., and Mellish, L.J., in *Gadd* v. *Houghton* (cited below), on the ground that the words "as agent" were sufficient to show that there was no intention to contract personally. The facts in this case were as follows: A contract in the following terms—"We have this day sold to you on account of J M & Co., Valencia, etc.," was signed by home agents in their own names without qualification. Held, that the agents were not personally liable, though the contract was made on behalf of foreign principals, the words "on account of" clearly showing that there was no intention to contract personally (*c*). So, where a home agent was described as contracting "on behalf of A B, Roanne," it was held that he was not liable, though he signed the contract in his own name without qualification (*d*).

8. A contract is signed "for A B, of L, C Bros., as agents". C Bros. are not liable, unless it clearly appears from the body of the contract that they intended to bind themselves (*e*). A custom that an agent is liable to the exclusion of the foreign principal will not apply if it is inconsistent with the contract (*e*). So, where a contract was signed "G W, J. L, for C J M & Co.," it was held that G W and J L were not personally liable (*f*).

9. A charterparty was signed "For and on behalf of James McKelvie and Co. as agents, J. A. McKelvie," but James McKelvie & Co. were described in the body of the agreement as charterers. Held, that James McKelvie & Co. were not personally liable, the qualified signature indicating an intention to exclude personal liability (*g*).

10. An agent signed a contract—"P P A, J A & Co., A B". The contract contained a clause, providing that A B should guarantee moneys due from his principal to the other contracting party. Parol evidence was admitted to

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(*z*) *Parker* v. *Winlow* (1857), 27 L. J. Q. B. 49; 7 E. & B. 942.

(*a*) *Kennedy* v. *Gouveia* (1823), 3 D. & R. 503.

(*b*) *Paice* v. *Walker* (1870), L. R. 5 Ex. 173; 39 L. J. Ex. 109. See also *Brandt* v. *Morris*, [1917] 2 K. B. 784, C. A.

(*c*) *Gadd* v. *Houghton* (1876), 1 Ex. D. 357; 46 L. J. Ex. 71, C. A.; *Spittle* v. *Lavender* (1821), 2 B. & B. 452.

(*d*) *Ogden* v. *Hall* (1879), 40 L. T. 751.

(*e*) *Deslandes* v. *Gregory* (1860), 30 L. J. Q. B. 36, Ex. Ch.; *Miller* v. *Smith*, [1917] 2 K. B. 141; 86 L. J. K. B. 1259, C. A.

(*f*) *Redpath* v. *Wigg* (1866), L. R. 1 Ex. 335; 35 L. J. Ex. 211, Ex. Ch.

(*g*) *Universal S. N. Co.* v. *McKelvie*, [1923] A. C. 492; 92 L. J. K. B. 647, H. L., overruling *Lennard* v. *Robinson* (1855), 24 L. J. Q. B. 275; 5 E. & B. 125. See also *Kimber Coal Co.* v. *Stone*, [1926] A. C. 414; 95 L. J. K. B. 601, H. L.

show that A B intended to sign, not only as an agent, but also as a surety. Held, that such evidence was rightly admitted, and that he must be taken to have signed in both capacities (*h*).

## Article 120

### ADMISSIBILITY OF PAROL EVIDENCE OF INTENTION

Where it appears from the terms of a written contract made by an agent that he contracted personally, parol evidence is not admissible to show that, notwithstanding the terms of the contract, it was the intention of the parties that he should not be personally liable thereon, because such evidence would be contradictory to the written contract (*i*) ; but he may, by way of equitable defence, prove a verbal agreement that, in consideration of his being merely an agent, he should not be personally liable on the contract, because it would be inequitable in such a case to take advantage of his having contracted personally (*k*).

Where it appears from the terms of a written contract made by an agent that he contracted merely as an agent, parol evidence is nevertheless admissible to show that, by a custom or usage in the particular trade or business, an agent so contracting is liable on the contract, either absolutely or conditionally ; provided that such custom or usage is not inconsistent with nor repugnant to the express terms of the written contract (*l*).

*Illustrations*

1. An agent signed a charterparty expressly "as agent for principals," the principals being undisclosed. It was held that, although it plainly appeared that he did not intend to contract as principal, it might nevertheless be proved that, by a general custom, an agent so signing was, in the ordinary course of trade, personally liable on the contract in the event of his not disclosing the principals within a reasonable time, such a custom not being inconsistent with the terms of the contract (*m*).

2. A broker entered into a contract in the following terms :—"Sold by A to Messrs. B, for and on account of owner, 100 bales of hops". An action was brought against A for not delivering the hops according to sample. Evidence of a custom in the hop trade, whereby a broker who does not disclose his principal at the time of the contract is personally liable, was admitted, and the broker was held liable on the contract (*n*).

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(*h*) *Young* v. *Schuler* (1883), 11 Q. B. D. 651, C. A.

(*i*) *Higgins* v. *Senior* (1841), 8 M. & W. 834 ; *Holding* v. *Elliott* (1860), 29 L. J. Ex. 134 ; 5 H. & N. 117 ; *Jones* v. *Littledale* (1837), 6 L. J. K. B. 169 ; 1 N. & P. 677. See § 323 of the American Restatement.

(*k*) *Wake* v. *Harrop* (1862), 31 L. J. Ex. 451 ; 1 H. & C. 202, Ex. Ch. ; affirming 6 H. & N. 768 ; *Cowie* v. *Witt* (1874), 23 W. R. 76. And see *Kidson* v. *Dilworth* (1818), 5 Price 564.

(*l*) Illustrations 1 to 4.

(*m*) *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482 ; 42 L. J. C. P. 260.

(*n*) *Pike* v. *Ongley* (1887), 18 Q. B. D. 708 ; 56 L. J. Q. B. 373 ; *Dale* v. *Humfrey*, *Humfrey* v. *Dale* (1858), 27 L. J. Q. B. 390 ; El. Bl. & El. 1004 ; 113 R. R. 964, Ex. Ch. (similar custom in the oil trade).

3. A and B, who were brokers, contracted in the following terms :— "We have this day sold for your account to our principal, etc." (signed) "A and B, brokers". Some of the goods were accepted by the principal, whose name was declared by A and B before delivery, and an action was subsequently brought against A and B for not accepting the residue. Held, that they were personally liable, it being proved that by a custom in the particular trade, the broker was personally liable for his principal's default unless the name of the principal was inserted in the written contract (*o*). So, by the usage of the London dry goods market, where a broker buys goods for an undisclosed principal, he is personally liable for the price (*p*).

4. Brokers entered, as such, into a contract, which contained a clause providing that they should act as arbitrators in the event of any dispute between the parties. Held, that evidence of a custom rendering them personally liable on the contract was inadmissible, because the custom was inconsistent with the clause appointing them arbitrators (*q*).

## Article 121

### VERBAL CONTRACTS

Where an agent makes a contract which is not reduced to writing, the question whether he contracted personally or merely in his capacity of an agent is a question of fact (*r*).

*Illustrations*

1. Brokers sell goods by auction, and invoice them in their own names as sellers. It is a question of fact whether the invoice was intended to be the contract. If it were, the brokers are personally liable. If not, it is a question of fact whether they intended to contract personally (*s*).

2. An estate agent contracted to sell land, and gave a receipt in his own name for the deposit. Held, that it was a question of fact whether he contracted personally (*t*). So, where an agent bought goods at a sale by auction, and gave his own name as buyer (*u*).

## Article 122

### EFFECT OF JUDGMENT AGAINST PRINCIPAL

The liability of an agent on any contract made by him is

(*o*) *Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126 ; 41 L. J. Q. B. 49 (fruit trade and colonial market). Similar custom in the rice trade : *Bacmeister* v. *Fenton* (1883), 1 C. & E. 121.

(*p*) *Imperial Bank* v. *L. & St. Katharine's Docks Co.* (1876), 5 Ch. D. 195 ; 46 L. J. Ch. 335.

(*q*) *Barrow* v. *Dyster* (1884), 13 Q. B. D. 635.

(*r*) *Lakeman* v. *Mountstephen* (1874), L. R. 7 H. L. 17 ; 43 L. J. Q. B. 188, H. L. ; *Gurney* v. *Womersley* (1854), 4 E. & B. 133 ; 24 L. J. Q. B. 46 ; *Magee* v. *Atkinson* (1837), 2 M. & W. 440 ; 6 L. J. Ex. 115 ; *Seaber* v. *Hawkes* (1831), 5 M. & P. 549 ; *Ex p. Hartop* (1806), 12 Ves. 352 ; *Johnson* v. *Ogilby* (1734), 3 P. Wms. 277 ; *Owen* v. *Gooch* (1797), 2 Esp. 567 ; *Castle* v. *Duke* (1832), 5 C. & P. 359.

(*s*) *Jones* v. *Littledale* (1837), 6 A. & E. 486 ; 6 L. J. K. B. 169 ; *Holding* v. *Elliott* (1860), 5 H. & N. 117 ; 29 L. J. Ex. 134.

(*t*) *Long* v. *Millar* (1879), 4 C. P. D. 450 ; 48 L. J. C. P. 596, C. A.

(*u*) *Williamson* v. *Barton* (1862), 7 H. & N. 899 ; 31 L. J. Ex. 170.

discharged by a judgment being obtained against the principal on the contract (*w*).

## Article 123

AGENT SHOWN TO BE THE REAL PRINCIPAL

Where a person professes to contract as an agent, whether in writing or verbally, and it is shown that he is, in fact, himself the principal, and was acting on his own behalf, he is personally liable on the contract (*x*).

## Article 124

PRINCIPAL FICTITIOUS OR NON-EXISTENT

Where a person professes to contract on behalf of a principal, and the principal is a fictitious or non-existent person, the person so professing to contract is presumed to have intended to contract personally, unless a contrary intention be proved, and where the contract is in writing, such intention cannot be proved by parol evidence, but must appear from the terms of the contract or from the surrounding circumstances (*y*).

*Illustrations*

1. A enters into a written contract on behalf of a company not yet incorporated. A is personally liable on the contract, even if he express himself as contracting on behalf of the future company, and parol evidence is not admissible to show that he did not intend to contract personally, because it is only by holding him personally liable that any effect at all can be given to the contract (*z*).

2. The promoters of a future company borrowed money from a bank, to be repaid out of calls on shares. Held, that the promoters must be taken to have contracted to repay the money out of calls, if the calls should prove sufficient, and if not, to pay personally (*a*).

3. The managing committee of a club authorise the steward to order provisions for the use of the club. A supplies provisions on his orders, and invoices them to the club. If A looked to the funds of the club alone for payment, and contracted on the term that if there were no such funds, he should not be paid, the committee are not personally liable. But they are

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(*w*) *L. G. O. Co.* v. *Pope* (1922), 38 T. L. R. 270.

(*x*) *Carr* v. *Jackson* (1852), 7 Ex. 382 ; 21 L. J. Ex. 137 ; *Jenkins* v. *Hutchinson* (1849), 13 Q. B. 744 ; 18 L. J. Q. B. 274 ; *Railton* v. *Hodgson* (1812), 15 East 67 ; *Adams* v. *Hall* (1877), 37 L. T. 70.

(*y*) See § 326 of the American Restatement.

(*z*) *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174 ; 36 L. J. C. P. 94 ; *Wilson* v. *Baker* (1901), 17 T. L. R. 473. A company cannot ratify a contract made before its incorporation. Comp. *Hollman* v. *Pullin* (1884), 1 C. & E. 254.

(*a*) *Scott* v. *Ebury* (1867), L. R. 2 C. P. 255 ; 36 L. J. C. P. 161 ; *Coutts* v. *Irish Exhibition* (1891), 7 T. L. R. 313, C. A.

personally liable if he gave credit to them (*b*). Whether A gave credit to the committee or looked to the funds of the club alone is a question of fact (*b*).

4. A, a colonel of a volunteer corps, contracts on behalf of the corps with B. A does not intend to pledge, nor does B intend to accept, his personal credit, but both think that the corps as an entity may be bound. A is not personally liable on the contract (*c*).

## Article 125

### IMPLIED WARRANTY OF AUTHORITY

Where any person, by words or conduct, represents that he has authority to act on behalf of another, and a third person is induced by such representation to act in a manner in which he would not have acted if such representation had not been made, the first-mentioned person is deemed to warrant that the representation is true, and is liable for any loss caused to such third person by a breach of such implied warranty, even if he acted in good faith, under a mistaken belief that he had such authority (*d*). Where any such representation is made fraudulently, the person injured thereby may sue either in contract for the breach of warranty, or in tort for the deceit, at his option (*e*).

Every person who professes to contract as an agent is deemed by his conduct to represent that he is in fact duly authorised to make the contract (*f*), except where the nature and extent of his authority or all material facts known to him from which its nature and extent may be inferred, are fully known to the other contracting party (*g*), or the professing agent expressly disclaim any present authority (*h*).

This article does not extend to a representation made in good faith with regard to a question of law, in which no representation of fact is involved (*i*).

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(*b*) *Steele* v. *Gourley* (1887), 3 T. L. R. 772, C. A. ; *Overton* v. *Hewett* (1887), 3 T. L. R. 246 ; *Bailey* v. *Macauley* (1849), 13 Q. B. 815 ; 19 L. J. Q. B. 73. See also p. 10, *ante*.

(*c*) *Jones* v. *Hope* (1880), 3 T. L. R. 247, n., C. A. Comp. *Cross* v. *Williams* (1862), 31 L. J. Ex. 145 ; *Samuel* v. *Weatherby*, [1908] 1 K. B. 184 ; 77 L. J. K. B. 69, C. A.

(*d*) Illustrations 1 to 11. *Oxenham* v. *Smythe* (1861), 31 L. J. Ex. 110 ; 6 H. & N. 690 ; *Cherry* v. *Colonial Bank* (1869), 38 L. J. P. C. 49, P. C. ; *Brown* v. *Law* (1895), 72 L. T. 779, H. L. ; *British Russian Gazette* v. *Associated Newspapers*, [1933] 2 K. B. 616 ; 102 L. J. K. B. 775, C. A. See § 329 and also §§ 330 to 332 of the American Restatement.

(*e*) *Randell* v. *Trimen* (1856), 25 L. J. C. P. 307 ; 18 C. B. 786 ; *Polhill* v. *Walter* (1832), 3 B. & Ad. 114 ; 1 L. J. K. B. 92.

(*f*) *Collen* v. *Wright* (1857), 27 L. J. Q. B. 215 ; 7 E. & B. 301 ; 8 E. & B. 647, Ex. Ch. ; *Suart* v. *Haigh* (1893), 9 T. L. R. 488, H. L. See Illustrations 5, 9 to 11, and Illustrations to Article 126.

(*g*) Illustrations 10, 11. See also *Beattie* v. *Ebury* (1874), 41 L. J. Ch. 804.

(*h*) *Halbot* v. *Lens*, [1901] 1 Ch. 344 ; 70 L. J. Ch. 125.

(*i*) Illustrations 6 and 12. *Beattie* v. *Ebury*, *supra* ; affirmed L. R. 7 H. L. 102, H. L. ; *Saffron Walden Building Society* v. *Rayner* (1880), 14 Ch. D. 406 ; 49 L. J. Ch. 465, C. A.

Where the authority of the agent is disputed by the person on whose behalf the contract is made, the person who made the contract may be joined with him as a co-defendant, and relief be claimed against them alternatively (*k*).

*Auctioneers*

If an auctioneer by mistake sells a horse by auction without authority, he is liable to the purchaser on an implied warranty of authority for loss of the bargain (*l*). But where goods are sold by auction under conditions which provide that each lot shall be offered subject to a reserve price, and the auctioneer, having by mistake accepted a bid for less than the reserve price, discovers his mistake immediately, withdraws the lot, and refuses to sign a memorandum of the contract, he is not liable in an action for breach of implied warranty of authority, because in such a case the offer, bidding, and acceptance are all conditional on the reserve price having been reached (*m*). He is, however, liable if he sign a memorandum (*n*).

*Illustrations*

*Company Directors*

1. The directors of a company wrote a letter to the company's bankers representing that A had been appointed manager and had authority to draw cheques on the company's account, which, to the knowledge of the directors, was already overdrawn. A further overdrew the account, the directors having, in fact, no authority to overdraw. Held, that the directors were liable to the bankers for breach of an implied warranty that they had authority to overdraw (*o*). But the mere fact that directors of a company in that capacity sign cheques drawn on the company's bankers after the account is overdrawn, does not amount to a representation that they have authority to overdraw the account, or to borrow money on the company's behalf (*p*).

2. A lent £70 to a building society, and received a certificate of the deposit, signed by two directors. The society had no borrowing powers. Held, that the directors were personally liable to A on an implied warranty that they had authority to borrow on behalf of the society (*q*).

3. The directors of a company issued a certificate for debenture stock, which A agreed to accept in lieu of cash due to him from the company, all the debenture stock that the company had power to issue having already been issued. Held, that the directors were liable to A on an implied warranty that they had authority to issue valid debenture stock, although they had acted in good faith, not knowing that all the stock had been issued (*r*). So, where directors of a company which had already fully exercised its borrowing

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(*k*) *Honduras Ry.* v. *Lefevre* (1877), 2 Ex. D. 301 ; 46 L. J. Ex. 391 ; *Bennetts* v. *McIlwraith*, [1896] 2 Q. B. 464 ; 65 L. J. Q. B. 632, C. A.

(*l*) *Anderson* v. *Croall* (1904), 6 F. 153.

(*m*) *McManus* v. *Fortescue*, [1907] 2 K. B. 1 ; 76 L. J. K. B. 393, C. A. And see *Rainbow* v. *Howkins*, [1904] 2 K. B. 322 ; 73 L. J. K. B. 641.

(*n*) *Fay* v. *Miller*, [1941] Ch. 360 ; 110 L. J. Ch. 124, C. A.

(*o*) *Cherry* v. *Colonial Bank* (1869), 38 L. J. P. C. 49, P. C.

(*p*) *Beattie* v. *Ebury*, *supra*, note (*g*).

(*q*) *Richardson* v. *Williamson* (1871), L. R. 6 Q. B. 276 ; 40 L. J. Q. B. 145.

(*r*) *Firbank* v. *Humphreys* (1886), 18 Q. B. D. 54 ; 56 L. J. Q. B. 57, C. A. Comp. *Elkington* v. *Hurter*, [1892] 2 Ch. 452 ; 61 L. J. Ch. 514, and Illustration 8.

powers, issued a debenture bond, it was held that the directors thereby impliedly warranted that they had authority to issue a valid debenture (*s*).

4. The directors of an unincorporated company held out the secretary as having authority to borrow in excess of the amount prescribed by the rules of the company. The secretary borrowed in excess of such amount, and misappropriated the money. Held, that the directors were personally liable to the lenders on an implied warranty of authority, though they had not acted fraudulently (*t*).

5. The directors of a company accepted a bill of exchange drawn on the company, but told the drawer that they had no power to accept bills on the company's behalf, and that they did it merely in recognition of the company's debt, and on the express understanding that the bill should not be negotiated. Held, that the directors were liable to an indorsee for value, who had no notice of the circumstances, on an implied warranty that they had authority to accept the bill on behalf of the company (*u*).

6. The directors of a company having no borrowing powers induce A to advance money on the security of a Lloyd's bond, which they in good faith represent to be a valid security, A being aware that the company has no borrowing powers. The directors are not liable on an implied warranty of authority, though the bond is invalid, because its validity is a question of law (*a*). So, where directors issued certain stock and described it as No. 1 Preference Stock, in the erroneous belief that they had power to issue stock to rank with the No. 1 Preference Stock already issued, and A purchased some of the new stock, knowing that it was new stock, but believing that it would rank with the No. 1 Preference, it was held that the directors were not liable to make good the misrepresentation, because it was a misrepresentation as to a matter of law, and A had not been deceived by any misrepresentation of fact (*b*).

7. A stockbroker, acting in good faith, induces the Bank of England to transfer consols to a purchaser under a forged power of attorney. He is liable, in an action for breach of an implied warranty of authority, to indemnify the Bank against the claim of the stockholder for restitution (*c*).

8. A acts as broker for both buyer and seller. He impliedly warrants to each that he is duly authorised to act on behalf of the other (*d*).

9. A widow, not having received any information that her husband was dead, ordered necessaries from a tradesman who had previously supplied goods to her on the credit of the husband and been paid for them by him, the husband, to the knowledge of the tradesman, having been resident abroad.

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(*s*) *Weeks* v. *Propert* (1873), L. R. 8 C. P. 427 ; 42 L. J. C. P. 129 ; *Whitehaven Bank* v. *Reed* (1886), 2 T. L. R. 353, C. A. Comp. Illustration 8.

(*t*) *Chapleo* v. *Brunswick Building Society* (1881), 6 Q. B. D. 696 ; 50 L. J. Q. B. 372, C. A. Comp. *Smith* v. *Reed* (1886), 2 T. L. R. 442, C. A.

(*u*) *West London Bank* v. *Kitson* (1884), 13 Q. B. D. 360 ; 53 L. J. Q. B. 345, C. A.

(*a*) *Rashdall* v. *Ford* (1866), L. R. 2 Eq. 750 ; 35 L. J. Ch. 769.

(*b*) *Eaglesfield* v. *Londonderry* (1876), 38 L. T. 303, H. L. ; affirming 4 Ch. D. 693.

(*c*) *Starkey* v. *Bank of England*, [1903] A. C. 114 ; 72 L. J. Ch. 402, H. L. And see *Sheffield Corpn.* v. *Barclay*, [1905] A. C. 392 ; 74 L. J. K. B. 747, H. L. ; *Bank of England* v. *Cutler*, [1908] 2 K. B. 208 ; 77 L. J. K. B. 889, C. A.

(*d*) *Hughes* v. *Graeme* (1864), 33 L. J. Q. B. 335. See also *Queensland Investment Co.* v. *O'Connell* (1896), 12 T. L. R. 502.

Held, that the circumstances being equally within the knowledge of both parties, and the widow not having omitted to state any fact known to her which was relevant to the existence or continuance of her authority, she was not liable for the price of the necessaries (*e*), and this principle has been applied in the case of the dissolution of a company (*f*).

10. A shipbroker signs a charterparty—"by telegraphic authority ; as agent". It is proved that such a form of signature is commonly adopted to negative the implication of any further warranty by the agent than that he has received a telegram, which, if correct, authorises such a charterparty as he is signing. The shipbroker is not answerable for a mistake in the telegram (*g*).

11. H, a shipbroker, professes to make a charterparty on behalf of A, and signs it—"by telegraphic authority of B ; G. H. as agent". B is A's agent, but A did not authorise the charterparty. H is liable for breach of an implied warranty that he has authority to make the charterparty on behalf of A, though he acted in good faith, believing that the telegram from B gave him such authority (*h*).

12. Where a solicitor, without authority, prosecutes or defends an action, the action will in general be dismissed or the defence struck out on the motion of either the plaintiff or the defendant, and the solicitor so acting without authority be ordered to pay all the costs occasioned thereby (*i*).

13. A professes to contract on behalf of a volunteer corps with B, both parties erroneously thinking that the corps as an entity may be bound. A is not liable to B on an implied warranty of authority, because the facts were equally well known to both, and there was merely a common misconception in point of law (*k*).

## Article 126

MEASURE OF DAMAGES FOR BREACH OF WARRANTY OF AUTHORITY

The measure of damages for breach of an express or implied warranty of authority is the loss sustained either as a natural and probable consequence, or such as both parties might reasonably

(*e*) *Smout* v. *Ilbery* (1842), 10 M. & W. 1. In *Salton* v. *New Beeston Cycle Co.*, [1900] 1 Ch. 43 ; 69 L. J. Ch. 20, the principle was applied in the case of the dissolution of a company.

(*f*) *Salton* v. *New Beeston Cycle Co.*, [1900] 1 Ch. 43 ; 69 L. J. Ch. 20.

(*g*) *Lilly* v. *Smales*, [1892] 1 Q. B. 456.

(*h*) *Suart* v. *Haigh* (1893), 9 T. L. R. 488, H. L.

(*i*) *Hubbart* v. *Phillips* (1845), 14 L. J. Ex. 103 ; 2 D. & L. 707 ; *Nurse* v. *Durnford* (1879), 13 Ch. D. 764 ; 49 L. J. Ch. 229 ; *Schjott* v. *Schjott* (1881), 45 L. T. 333, C. A. ; *Newbiggin Gas Co.* v. *Armstrong* (1879), 13 Ch. D. 310 ; 49 L. J. Ch. 231, C. A. ; *Reynolds* v. *Howell* (1873), L. R. 8 Q. B. 398 ; 42 L. J. Q. B. 181 ; *Re Savage* (1880), 15 Ch. D. 557 ; *Re Manby* (1856), 26 L. J. Ch. 313 ; *Fricker* v. *Van Grutten*, [1896] 2 Ch. 649 ; 65 L. J. Ch. 823, C. A. ; *Gold Reefs of Western Australia* v. *Dawson*, [1897] 1 Ch. 115 ; 66 L. J. Ch. 147 ; *Geilinger* v. *Gibbs*, [1897] 1 Ch. 479 ; 66 L. J. Ch. 230 ; *Salton* v. *New Beeston Cycle Co.*, [1900] 1 Ch. 43 ; 69 L. J. Ch. 20 ; *Yonge* v. *Toynbee*, [1910] 1 K. B. 215 ; 79 L. J. K. B. 208, C. A. ; *Simmons* v. *Liberal Opinion, Ltd., Re Dunn*, [1911] 1 K. B. 966 ; 80 L. J. K. B. 617, C. A. ; *Porter* v. *Fraser* (1912), 29 T. L. R. 91 ; *Fernée* v. *Gorlitz*, [1915] 1 Ch. 177 ; 84 L. J. Ch. 404 ; *Brendon* v. *Spiro*, [1938] 1 K. B. 176, C. A. See, however, *Hammond* v. *Thorpe* (1834), 1 C. M. & R. 64 ; *Thomas* v. *Finlayson* (1871), 19 W. R. 255 ; *Onassis* v. *Drewry S. A. R. L.* (1949), 82 Ll. L. Rep. 565.

(*k*) *Jones* v. *Hope* (1880), 3 T. L. R. 247, n., C. A.

expect to result as a probable consequence, of the breach of warranty (*l*).

Where a contract is repudiated by the person on whose behalf it was made, on the ground that it was made without his authority, such loss is *prima facie* the amount of damages that could have been recovered from him in an action at law if he had duly authorised and refused to perform the contract, together with the costs and expenses (if any) incurred in respect of any legal proceedings reasonably taken against him on the contract (*m*). Where the contract would not have been enforceable at law, as against the principal, even if he had duly authorised it, because the formalities required by law were not observed, the equitable doctrine of part performance does not apply so as to give a remedy in equity for damages in respect of the breach of warranty of authority (*n*).

*Illustrations*

1. The directors of a company represent that they have authority to issue debenture stock, and A is induced to accept such stock in lieu of cash, in payment of a debt owing to him by the company. The measure of damages for breach of the implied warranty of authority is the amount that A could have recovered from the company if the stock had been valid (*o*).

2. Directors of a building society represent that they have authority to borrow money on behalf of the society, and A is induced to lend £70. The society being solvent, the measure of damages for breach of the implied warranty of authority is £70, with interest at the rate agreed upon (*p*).

3. A contracted, on behalf of B, to buy a ship. A was not authorised so to do, and B repudiated the contract. The seller having resold the ship at a lower price, it was held that the measure of damages recoverable against A was the difference between the contract price and the price at which the vessel was resold (*q*).

4. A instructed B to apply for shares in a certain company. B by mistake applied for shares in another company, and they were duly allotted to A. The last-mentioned company was ordered to be wound up, and A's name was removed from the list of contributories on the ground that he had not authorised the application for shares. Held, that, A being solvent and the shares unsaleable, the liquidator of the company was entitled to recover from B the full amount payable on the shares (*r*).

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(*l*) Illustrations 1 to 8. *Mitchell* v. *Kahl* (1862), 2 F. & F. 709. See § 329 comment j of the American Restatement.

(*m*) Illustrations 3, and 6 to 8.

(*n*) Illustration 9. Nor is there any remedy at law in such a case because, the contract not being enforceable at law, there is no legal damage from the breach of warranty. And see Article 125.

(*o*) *Firbank* v. *Humphreys* (1886), 18 Q. B. D. 54 ; 56 L. J. Q. B. 57, C. A., cited *ante*, p. 261 ; *Weeks* v. *Propert* (1873), L. R. 8 C. P. 427 ; 42 L. J. C. P. 129 ; *Whitehaven Bank* v. *Reed* (1886), 2 T. L. R. 353, C. A.

(*p*) *Richardson* v. *Williamson* (1871), L. R. 6 Q. B. 276 ; 40 L. J. Q. B. 145.

(*q*) *Simons* v. *Patchett* (1857), 26 L. J. Q. B. 195 ; 7 E. & B. 568.

(*r*) *Re National Coffee Palace Co., ex p. Panmure* (1883), 24 Ch. D. 367 ; 53 L. J. Ch. 57, C. A.

5. A brought an action against a company in the United States, and recovered judgment for £1,000. An agent of the company in good faith represented that he had authority to settle for £300, and A agreed to accept that sum. The agent was, in fact, not authorised to settle. Held, that, the judgment against the company being, in the circumstances, unenforceable, A was entitled to recover £300 from the agent for the breach of the implied warranty of authority (*s*).

*Costs of Action against Principal*

6. A bought goods, professedly on behalf of B. The seller brought an action for the price against B, which was dismissed with costs, on the ground that A was not authorised by B. Held, that the seller was entitled to recover from A the price of the goods, and also the costs incurred in the action against B (*t*).

7. A professed to sell property on behalf of B. Held, that A, not being authorised to sell, was liable to the purchaser for the costs of a suit for specific performance against B, as well as for the value of the contract (*u*). But where an agent without authority verbally contracted to grant a lease for seven years, and the lessee entered into possession and defended an action of ejectment brought by the owner of the property, it was held that the lessee was not entitled to recover from the agent the costs of such action, as damages for the breach of warranty of authority, because he could not have successfully defended an action of ejectment, even if the agent had been duly authorised to grant the lease (*a*).

8. *Loss must be a natural and probable consequence of the breach.*—A contracted to sell an estate to B, and sent him an abstract of title, representing that he had the authority of the owners to sell. The owners repudiated the contract and sold the estate at a higher price to C. B sued the owners, and was nonsuited. In an action by B against A, it was held that the measure of damages for the breach of warranty of authority was—(1) the costs of investigating the title ; (2) the costs of the action up to the nonsuit ; and (3) the difference between the contract and market prices of the estate, the price at which it was resold to C being *prima facie* evidence of the market price ; but that the loss on a resale of horses, which were bought to stock the land before the investigation of the title and without notice to A, was too remote, it not appearing that the purchase of stock was contemplated by the parties when the contract was made (*b*). So, where an agent without authority granted a lease, and the lessee agreed to sell his interest, it was held that damages and costs recovered against the lessee for breach of such agreement to sell could not be recovered by him in an action against the agent for breach of warranty of authority, because such damages and costs were not a natural and probable consequence of the breach of warranty ; but that the lessee

(*s*) *Meek* v. *Wendt* (1888), 21 Q. B. D. 126.
(*t*) *Randell* v. *Trimen* (1856), 18 C. B. 786 ; 25 L. J. C. P. 307.
(*u*) *Hughes* v. *Graeme* (1864), 33 L. J. Q. B. 335 ; *Collen* v. *Wright* (1857), 8 El. & Bl. 647 ; 27 L. J. Q. B. 215, Ex. Cn.
(*a*) *Pow* v. *Davis* (1861), 30 L. J. Q. B. 257 ; 1 B. & S. 220. Such a lease must be by deed (Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 52), and every contract for a lease must be in writing (*ib.*, s. 40).
(*b*) *Godwin* v. *Francis* (1870), L. R. 5 C. P. 295 ; 39 L. J. C. P. 121.

was entitled to recover the value of the lease, and the costs of a suit for specific performance against the principal (*c*).

9. *No remedy on doctrine of part performance.*—A verbally contracts, without authority, to sell real estate to B. B has no remedy in equity against A for the breach of warranty of authority, on the ground of part performance (*d*).

## SECT. 2.—*Liabilities of Agents in Respect of Moneys Received*

### Article 127

TO REPAY MONEY RECEIVED FOR USE OF PRINCIPAL

Where money is paid to an agent for the use of his principal, and the circumstances of the case are such that the person paying the money is entitled to recover it back, the agent is personally liable to repay such money in the following cases, namely :—

(a) Where the agent contracts personally, and the money is paid to him in respect of or pursuant to the contract, unless the other contracting party elects to give exclusive credit to the principal (*e*) ;

(b) Where the money is obtained by duress (*f*), or by means of any fraud or wrongful act (*g*) to which the agent is party or privy ;

(c) Where the money is paid under a mistake of fact, or under duress, or in consequence of some fraud or wrongful act, and repayment is demanded of the agent, or notice is given to him of the intention of the payer to demand repayment, before he has in good faith paid the money over to, or otherwise dealt to his detriment with, the principal in the belief that the payment was a good and valid payment (*h*).

Except as in this Article provided, no agent is personally liable to repay money received by him for the use of his principal (*i*).

With regard to (c), where there is no actual change of circumstances to the detriment of the agent in consequence of the payment, the mere fact that

(*c*) *Spedding* v. *Nevell* (1869), L. R. 4 C. P. 212 ; 38 L. J. C. P. 133.

(*d*) *Warr* v. *Jones* (1876), 24 W. R. 695 ; *Sainsbury* v. *Jones* (1840), 2 Beav. 462 ; 48 R. R. 217. Nor is there any remedy at law in such a case, in consequence of the provisions of the Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 40.

(*e*) Illustrations 1 and 9.

(*f*) Illustration 2. This does not apply where the duress does not proceed from the agent, and he has paid over the money without notice that it was paid under duress : *Owen* v. *Cronk*, [1895] 1 Q. B. 265 ; 64 L. J. Q. B. 288.

(*g*) Illustrations 3 to 5. *Townson* v. *Wilson* (1808), 1 Camp. 396 ; *Steele* v. *Williams* (1853), 8 Ex. 625 ; 22 L. J. Ex. 225.

(*h*) Illustration 9. *Cary* v. *Webster* (1731), 1 Str. 480.

(*i*) Illustrations 1, 6 to 12. *Cary* v. *Webster* (1731), 1 Str. 480 ; *Greenway* v. *Hurd* (1792), 4 T. R. 553 ; *Davys* v. *Richardson* (1888), 21 Q. B. D. 202 ; 57 L. J. Q. B. 409, C. A. ; *Taylor* v. *Metropolitan Ry.*, [1906] 2 K. B. 55 ; 75 L. J. K. B. 735 ; *Steam Saw Mills* v. *Baring*, [1922] 1 Ch. 244 ; 91 L. J. Ch. 325, C. A. ; *Gowers* v. *Lloyds, etc., Foreign Bank* (1938), 158 L. T. 467, C. A.

he has credited the principal with the amount is not sufficient to discharge him from liability to repay money paid to him under a mistake of fact (*k*).

*Illustrations*

1. An agent discounts certain bills, and in good faith pays over the proceeds to his principal. The bills turn out to be forgeries. The discounter has no remedy against the agent unless he indorsed or guaranteed the bills, or dealt as a principal with the discounter (*l*). But the agent is personally liable to repay the amount, as upon a total failure of consideration, if he dealt as a principal with the discounter (*m*).

2. A sheriff issued a warrant of distress against A. The bailiff levied the debt on the goods of B, and, under pressure of the illegal distress, B paid the debt. Held, that the bailiff was personally liable to repay B, though he had paid the amount over to the sheriff (*n*).

3. Pending a bankruptcy petition, and with notice of the act of bankruptcy, a solicitor, as the agent of the petitioning creditor, received from the debtor various sums of money in consideration of the adjournment of the petition, and paid such sums over to his principal. Held, that the solicitor was personally liable to repay the amount to the trustee in bankruptcy, notwithstanding the payment over, because the money was obtained wrongfully (*o*).

4. An agent who acts for an executor *de son tort* is personally liable to account for assets collected by him, even after he has paid them over to his principal. Payment over is no defence in the case of wrongdoers (*p*).

5. An agent demands more money than is due, and wrongfully withholds documents from A, who pays him the amount demanded, under protest, in order to recover the documents. The agent is personally liable to A in respect of the amount overpaid, even after he has paid the money over to the principal (*q*).

6. An insurance agent received money from an underwriter in respect of a voidable policy, and settled with the principal for the amount, amongst other matters, without notice of the underwriter's intention to dispute the policy, and without fraud. Held, that the agent was not liable to repay the amount to the underwriter, who had paid it to him under a mistake of fact (*r*).

7. A bill of exchange was indorsed, without the holder's authority, to A. The acceptor paid A's agent for collection, who handed the money over to

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(*k*) *Buller* v. *Harrison* (1777), Cowp. 565 ; *Cox* v. *Prentice* (1815), 3 M. & S. 344 ; *Kleinwort* v. *Dunlop Rubber Co.* (1907), 97 L. T. 263, H. L. ; *Scottish Met. Ass. Co.* v. *Samuel*, [1923] 1 K. B. 348 ; 92 L. J. K. B. 218.

(*l*) *Ex p. Bird, re Bourne* (1851), 20 L. J. Bk. 16 ; 4 De G. & S. 273.

(*m*) *Gurney* v. *Womersley* (1854), 4 E. & B. 133 ; 24 L. J. Q. B. 46 ; *Royal Exchange Ass.* v. *Moore* (1863), 8 L. T. 242.

(*n*) *Snowden* v. *Davis* (1808), 1 Taunt. 359. Comp. *Goodall* v. *Lowndes* (1844), 6 Q. B. 464.

(*o*) *Ex p. Edwards, re Chapman* (1884), 13 Q. B. D. 747, C. A.

(*p*) *Sharland* v. *Mildon* (1846), 15 L. J. Ch. 434 ; 5 Hare 469 ; *Padget* v. *Priest* (1787), 2 T. R. 97.

(*q*) *Smith* v. *Sleap* (1844), 12 M. & W. 585 ; *Oates* v. *Hudson* (1851), 6 Ex. 346 ; 20 L. J. Ex. 284 ; *Wakefield* v. *Newbon* (1844), 6 Q. B. 276 ; 13 L. J. Q. B. 258 ; *Close* v. *Phipps* (1844), 7 M. & G. 586.

(*r*) *Holland* v. *Russell* (1863), 32 L. J. Q. B. 297 ; 4 B. & S. 14, Ex. Ch. ; *Shand* v. *Grant* (1863), 15 C. B. (N.S.) 324.

A without notice of any defect in A's title. The acceptor was compelled to pay over again to the holder whose authority was wrongfully assumed. Held, that A's agent for collection was not personally liable to refund the amount to the acceptor (*s*).

8. The solicitor of the vendor at a sale by auction receives a deposit as agent for the vendor. The sale goes off through the vendor's default. The purchaser cannot maintain an action against the solicitor for the return of the deposit, whether he has paid it over to the vendor or not (*t*).

9. A bought goods from B, a broker, and by mistake paid him too much. B gave his principal, who was largely indebted to him, credit for the amount received. Held, that B was liable to repay to A the amount paid in excess, on the ground (1) that B virtually dealt as principal with A, and (2) that the mistake accrued to B's personal benefit (*u*).

10. The auctioneer at a sale by auction receives a deposit, and pays it over to the vendor. He is personally liable to refund the amount on the default of the vendor, because it was his duty to hold it as a stakeholder until the completion or rescission of the contract (*a*). But he is not liable to pay interest, however long he may have held the deposit, until it has been demanded, and he has improperly refused to pay it over to the person entitled (*b*)—at all events unless he is shown to have received interest on the money (*c*).

11. An auctioneer sold certain shares by private contract, and received a deposit. The purchaser declined to complete, on the ground that the contract was void as not complying with the provisions of Leeman's Act (*d*), and sued the auctioneer for the return of the deposit. Held, that, the auctioneer having paid over the amount of the deposit to the vendor before the repudiation of the contract, the purchaser was not entitled to recover, because the auctioneer was authorised to pay over the deposit to the vendor either on the completion of the contract or on the purchaser's refusal to complete, and such authority had not been revoked (*e*).

12. A, a pensioner, collected his pension from the Crown Agents for the Colonies through the defendant bank, by means of receipt forms sent to him by the Crown Agents. Each receipt form contained a certificate that A was still alive. The forms when completed were sent by A to the bank who obtained payment on A's behalf from the Crown Agents and credited A's account with the amount so obtained. A died. Thereafter, receipt forms, containing a forged signature, purporting to be that of A, and a false certificate that A was still living, were sent to the bank by a person pretending to be A, and the bank, believing that the signatures and certificates were genuine

(*s*) *East India Co.* v. *Tritton* (1824), 5 D. & R. 214.

(*t*) *Ellis* v. *Goulton*, [1893] 1 Q. B. 350 ; 62 L. J. Q. B. 232, C. A. ; *Bamford* v. *Shuttleworth* (1840), 11 A. & E. 926 ; *Hurley* v. *Baker* (1846), 16 M. & W. 26.

(*u*) *Newall* v. *Tomlinson* (1871), L. R. 6 C. P. 405.

(*a*) *Burrough* v. *Skinner* (1770), 5 Burr. 2639 ; *Gray* v. *Gutteridge* (1827), 3 C. & P. 40 ; *Furtado* v. *Lumley* (1890), 6 T. L. R. 168 ; *Edwards* v. *Hodding* (1814), 5 Taunt. 815.

(*b*) *Lee* v. *Munn* (1817), 1 Moore, 481 ; 19 R. R. 452 ; *Gaby* v. *Driver* (1828), 2 Y. & J. 549. See, however, Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), s. 3.

(*c*) *Curling* v. *Shuttleworth* (1829), 6 Bing. 121, 134.

(*d*) Banking Companies (Shares) Act, 1867 (30 & 31 Vict. c. 39), s. 1.

(*e*) *Galland* v. *Hall* (1888), 4 T. L. R. 761, C. A. And see *Hindle* v. *Brown* (1908), 98 L. T. 791, C. A.

and that A was still alive, collected the pension from the Crown Agents and credited the amount to A's account, from which it was withdrawn. The Crown Agents, having discovered that A was dead, sued the bank for the amount of the pension so collected after A's death. Held that the money, could not be recovered as money paid under a mistake of fact, as the bank had paid it over to a person who was their principal, and their belief that such person was A made no difference in this respect (*f*).

## Article 128

### MONEY RECEIVED FOR USE OF THIRD PERSONS

Where a specific fund (*g*) existing or accruing in the hands of an agent to the use of his principal, is assigned or charged by the principal to or in favour of a third person, the agent is bound, upon receiving notice of the assignment or charge, to hold the fund, or so much thereof as is necessary to satisfy the charge, to the use of such third party (*h*).

Where an agent is directed or authorised by his principal to pay to a third person money existing or accruing in his hands to the use of the principal, and he expressly or impliedly contracts with such third person to pay him, or to receive or hold the money on his behalf, or for his use, he is personally liable to pay such third person, or to receive or hold the money on his behalf, or for his use, as the case may be, even if he has had fresh instructions from the principal not to pay such third person (*i*).

Except as in this article provided, no agent is liable or accountable to any third person in respect of money in his hands which he has been directed or authorised to pay to such third person (*k*).

*Illustrations*

1. A principal assigns a specific fund existing or accruing in the hands of his agent to his use, and the assignee gives notice to the agent of the assignment. The agent is bound to account for the fund to the assignee (*l*), subject to any right of lien or set-off the agent may have against the principal at the

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(*f*) *Gowers* v. *Lloyds, etc., Foreign Bank* (1938), 158 L. T. 467, C. A.

(*g*) See *Citizens' Bank* v. *National Bank* (1874), L. R. 6 H. L. 352 ; 43 L. J. Ch. 269, H. L.

(*h*) Illustration 1. As to the distinction between an equitable assignment of or charge on a fund, and a mere authority to pay money out of the fund, see Illustrations 1, 5 and 8, and cases there cited. See also *Ex p. Hall, re Whitting* (1879), 10 Ch. D. 615 ; 48 L. J. Bk. 79, C. A. ; *Brandt* v. *Dunlop Rubber Co.*, [1905] A. C. 454 ; 74 L. J. K. B. 398, H. L.

(*i*) Illustrations 2 to 4. *Griffin* v. *Weatherby* (1868), L. R. 3 Q. B. 753 ; 37 L. J. Q. B. 280 ; *Hodgson* v. *Anderson* (1825), 3 B. & C. 842 ; *Lilly* v. *Hays* (1836), 5 A. & E. 548.

(*k*) Illustrations 5 to 8. *Gibson* v. *Minet* (1824), 9 Moore 31 ; *Wharton* v. *Walker* (1825), 6 D. & R. 288.

(*l*) *Webb* v. *Smith* (1885), 30 Ch. D. 192 ; 55 L. J. Ch. 343, C. A. ; *Ex p. South* (1818), 3 Swan. 392 ; *Rodick* v. *Gandell* (1852), 1 De G. M. & G. 763 ; *Greenway* v. *Atkinson* (1881), 29 W. R. 560 ; *Branat* v. *Dunlop Rubber Co., supra.*

time when he receives notice of the assignment (*m*). So, if a debtor charge a fund in the hands of his agent with payment of the debt, the agent is liable to the creditor upon receiving notice of the charge (*l*).

2. A principal gives his agent authority to pay money to A, a third person. The agent promises A that he will pay him when the amount is ascertained. The agent is liable to A for the amount when it is ascertained, though in the meantime the principal has become bankrupt (*n*), or has countermanded his authority (*o*).

3. A principal writes a letter authorising his agent to pay to A the amounts of certain acceptances, as they become due, out of the proceeds of certain assignments. A shows the letter to the agent, who assents to the terms of it. Before the acceptances fall due, the principal becomes bankrupt, and the agent pays the proceeds of the assignments to the trustee in bankruptcy. The agent is personally liable to A for the amounts of the acceptances as they become due (*p*).

4. A bill drawn on an agent is made payable out of a particular fund, and the agent promises to pay the holder when he receives money for the principal. The agent is liable to the holder, if he subsequently receive the money (*q*).

5. An acceptor of a bill pays money to a banker for the purpose of taking up the bill, and the banker promises to apply the money accordingly. The banker refuses to take up the bill, and claims to retain the money for a balance due to him from the acceptor. The drawer of the bill has no right of action, either at law or in equity, against the banker to compel him to apply the money to the payment of the bill, there being no privity of contract between them (*r*). So, where an agent is authorised to pay a debt out of moneys in his hands, and there is no assignment of or charge on such moneys to or in favour of the creditor, the agent is not liable to the creditor, unless he expressly or impliedly contract to pay him, or to hold the money to his use (*s*).

6. An agent receives money for the express purpose of taking up a bill two days after its maturity. On tendering the money, he finds that the holders have sent back the bill, protested for non-acceptance, to their indorsers. He then receives fresh instructions not to pay. He is not liable to the holders of the bill, not having agreed to hold the money to their use (*t*). So, where an agent who was authorised to pay money to a third person, offered to pay

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(*m*) *Roxburghe* v. *Cox* (1881), 17 Ch. D. 520 ; 50 L. J. Ch. 772, C. A. ; *Webb* v. *Smith*, *supra*.

(*n*) *Crowfoot* v. *Gurney* (1832), 2 L. J. C. P. 21 ; 9 Bing. 372.

(*o*) *Robertson* v. *Fauntleroy* (1823), 8 Moore 10.

(*p*) *Walker* v. *Rostron* (1842), 9 M. & W. 411 ; *Fruhling* v. *Schroder* (1835), 7 C. & P. 103 ; *Hamilton* v. *Spottiswoode* (1849), 4 Ex. 200 ; 18 L. J. Ex. 393 ; *Noble* v. *National Discount Co.* (1860), 29 L. J. Ex. 210 ; 5 H. & N. 225.

(*q*) *Stevens* v. *Hill* (1805), 5 Esp. 247 ; *Langston* v. *Corney* (1815), 4 Camp. 176.

(*r*) *Moore* v. *Bushell* (1857), 27 L. J. Ex. 3 ; *Hill* v. *Royds* (1869), L. R. 8 Eq. 290 ; 38 L. J. Ch. 538 ; *Johnson* v. *Robarts* (1875), L. R. 10 Ch. 505 ; 44 L. J. Ch. 678.

(*s*) *Williams* v. *Everett* (1811), 14 East 582 ; *Howell* v. *Batt* (1833), 2 N. & M. 381 ; *Malcolm* v. *Scott* (1850), 5 Ex. 601 ; *Brind* v. *Hampshire* (1836), 1 M. & W. 365 ; *Wedlake* v. *Hurley* (1830), 1 C. & J. 83 ; *Bell* v. *N. W. Ry.* (1852), 15 Beav. 548 ; *Morrell* v. *Wootten* (1852), 16 Beav. 197 ; *Scott* v. *Porcher* (1817), 3 Meriv. 652.

(*t*) *Stewart* v. *Fry* (1817), 1 Moore 74.

on a condition to which such third person would not agree, it was held that that was not a sufficient agreement to render him liable to such third person (*u*).

7. An agent of an executor wrote to a legatee, stating and offering to remit the amount of his legacy, and subsequently remitted the amount, after deducting certain expenses. Held, that the agent had not contracted with the legatee, and was not liable to an action at his instance for the amount so deducted (*a*).

8. A gives B a cheque on A's banker. The cheque does not operate as an assignment to B of money in the banker's hands belonging to A, and B has no right of action against the banker for wrongfully dishonouring the cheque (*b*).

## Article 129

PUBLIC AGENTS NOT LIABLE TO THIRD PERSONS FOR MONEY DUE TO THEM

No public agent is liable or accountable to any third person, either at law or in equity, in respect of any money which as a public agent it is his duty to pay to such third person (*c*).

This Article applies also to agents of foreign States (*d*).

*Illustrations*

1. The Secretary for War was sued by a retired clerk of the War Office for his retired allowance. Held, that the action would not lie, even if the defendant were shown to have received the money applicable to such allowance (*e*). Nor will a mandamus lie to the Lords of the Treasury or Secretaries of State to compel them to deal with public moneys in their hands according to the provisions of the Appropriation Act or a Royal Warrant. They are answerable to the Crown, and to the Crown alone (*f*).

2. Booty was granted by the Queen to the Secretary of State for India in Council, in trust to distribute it to those who were found to be entitled thereto. Held, that he, being merely an agent of the Crown to distribute the fund, was not liable to account as a trustee to persons who were entitled to the booty (*g*). So, a Secretary of State is not accountable as a trustee for funds voted by Parliament, and received by him from the Treasury for the public service (*h*).

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(*u*) *Baron* v. *Husband* (1833), 4 B. & Ad. 611.

(*a*) *Barlow* v. *Browne* (1846), 16 L. J. Ex. 62 ; 16 M. & W. 126.

(*b*) *Schroeder* v. *Central Bank* (1876), 34 L. T. 735 ; *Hopkinson* v. *Forster* (1874), L. R. 19 Eq. 74.

(*c*) Illustrations 1 and 2. *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613 ; 75 L. J. K. B. 418, C. A.

(*d*) *Twycross* v. *Dreyfus* (1877), 5 Ch. D. 605 ; 46 L. J. Ch. 510, C. A. ; *Henderson* v. *Rothschild* (1887), 56 L. J. Ch. 471, C. A.

(*e*) *Gidley* v. *Palmerston* (1822), 3 B. & B. 275 ; *Wright* v. *Mills* (1890), 63 L. T. 186 ; *Rice* v. *Chute* (1801), 1 East 579 ; cf. *Priddy* v. *Rose* (1817), 3 Mer. 86 ; *Row* v. *Dawson* (1749), 1 Ves. Sen. 331 ; *Rice* v. *Everett* (1801), 1 East 583, n.

(*f*) *R.* v. *Secretary of State for War*, [1891] 2 Q. B. 326 ; 60 L. J. Q. B. 457, C. A. ; *R.* v. *Treasury* (1872), L. R. 7 Q. B. 387 ; 41 L. J. Q. B. 178.

(*g*) *Kinloch* v. *Secretary of State for India* (1882), 7 App. Cas. 619 ; 51 L. J. Ch. 885, H. L.

(*h*) *Grenville-Murray* v. *Clarendon* (1869), L. R. 9 Eq. 11 ; 39 L. J. Ch. 221.

## SECT. 3.—*Rights of Agents Against Third Persons*

### Article 130

RIGHT OF AGENT TO SUE IN OWN NAME ON CONTRACTS MADE BY HIM

An agent may sue in his own name on contracts made by him on behalf of his principal in the following cases, namely :—

(a) where he contracts personally (*i*) ;

(b) where, as for example in the case of factors and auctioneers, he has a special property in, or lien upon, the subject-matter of the contract, or has a beneficial interest in the completion thereof (*k*) ;

(c) in the case of insurance brokers, who may sue in their own names on all policies effected by them (*l*).

Where a person who enters into a contract professedly as an agent is in fact the real principal, he may sue on the contract—

where it has been partly performed or otherwise affirmed by the other contracting party with the knowledge that he is the real principal (*m*) ; and

(probably) where the identity of the contracting party is not a material element in the making of the contract, provided that he gives notice to the other contracting party, before action, that he is the real principal (*n*).

Except as in this article provided, no agent can maintain an action in his own name on any contract made by him as such (*o*), whether the principal be disclosed or undisclosed (*o*), and whether the agent act under a *del credere* commission or not (*p*).

A broker who makes a contract as such has no right of action in his own name on the contract (except in the case of an insurance broker) unless he has a beneficial interest in the completion thereof ; in this respect, a broker differs from a factor or auctioneer, who has a right to sue by reason of his special property in the goods (*q*). This special right of the auctioneer will

(*i*) Illustrations 1 and 2. *Robertson* v. *Wait* (1853), 8 Ex. 299 ; 22 L. J. Ex. 209 ; *Harper* v. *Williams* (1843), 4 Q. B. 219 ; 12 L. J. Q. B. 227 ; *Agacio* v. *Forbes* (1861), 14 Moo. P. C. 160 ; *Joseph* v. *Knox* (1813), 3 Camp. 320. See Articles 115 to 121, as to when an agent is deemed to contract personally. See also §§ 363, 364, 372 and 368 of the American Restatement.

(*k*) Illustration 3. *Snee* v. *Prescott* (1743), 1 Atk. 248 ; *Fisher* v. *Marsh* (1865), 34 L. J. Q. B. 177 ; 6 B. & S. 411 ; *Dickenson* v. *Naul* (1833), 4 B. & Ad. 638.

(*l*) *Provincial Insurance Co.* v. *Leduc* (1874), L. R. 6 P. C. 224 ; 43 L. J. P. C. 49, P. C. ; *Oom* v. *Bruce* (1810), 12 East 225 ; *Kensington* v. *Inglis* (1807), 8 East 273. See also *Lloyd's* v. *Harper* (1881), 16 Ch. D. 290 ; 50 L. J. Ch. 140, C. A.

(*m*) Illustration 4.

(*n*) Illustrations 4 to 6. *Bickerton* v. *Burrell* (1816), 5 M. & S. 383.

(*o*) Illustrations 7 to 12. *Sargent* v. *Morris* (1820), 3 B. & A. 277 ; *Gray* v. *Pearson* (1870), L. R. 5 C. P. 568. See also *Burgos* v. *Nascimento* (1909), 100 L. T. 71 ; *Jordeson* v. *London Hardwood Co.* (1914), 110 L. T. 666 ; *Flatau* v. *Keeping* (1931), 36 Com. Cas. 243, C. A. See also 180 L. T. 7 for a discussion of this case.

(*p*) *Bramwell* v. *Spiller* (1870), 21 L. T. 672. But see Illustration 13.

(*q*) *Fairlie* v. *Fenton* (1870), L. R. 5 Ex. 169 ; 30 L. J. Ex. 107 ; *Flatau* v. *Keeping*, *supra*.

continue even though his principal has been guilty of fraudulent misrepresentations. His right to sue on a cheque given to him in payment for goods sold is not affected by the fact that the seller was guilty of fraudulent misrepresentations, the auctioneer not being a party to the fraud, and having settled with the principal in ignorance thereof (*r*).

*Illustrations*

1. A contract was made in the following form : " It is mutually agreed between J. & R. W., of the one part, and S. J. C., on behalf of G. & M. Rail. Co., of the other part, etc." (signed) " J. & R. W., S. J. C." Held, that S. J. C. was entitled to sue in his own name for breach of the contract, he having contracted personally (*s*).

2. A broker contracted in writing in his own name to buy goods, the seller being told that there was a principal. The broker then, under a general authority from the principal, contracted to resell. On hearing of the last-mentioned contract, the principal refused to have anything to do with the goods, and the broker acquiesced. The seller then refused to deliver. Held, that the broker, having contracted personally, had a right to recover damages for the non-delivery, and that the principal's renunciation of the contract did not affect that right (*t*).

3. An auctioneer sells A's goods to a buyer who knows that they are A's property. The auctioneer may, nevertheless, sue in his own name for the price, because he has a special property in the goods (*u*).

4. A, professedly as agent for a named principal, contracted in writing to sell certain goods. The buyer, with notice that A was the real principal, accepted and paid for part of the goods. Held, that A might sue for the non-acceptance of the residue (*a*).

5. A signed a charterparty "as agent for the freighter", a clause being inserted therein limiting A's liability to certain events in view of his being an agent. A was himself the freighter. Held, that he might sue on the contract (the clause limiting his liability would be inoperative). Otherwise, if the other contracting party had relied on his character as agent, and would not have contracted with him had he known him to be the principal. The freighter, whoever he might have been, would have had a right to sue (*b*).

6. A broker signed a contract note, professedly as agent for an undisclosed principal. He was, in fact, acting on his own behalf, but the other contracting party was not aware of that. Held, that he could not sue on the contract, because there was no memorandum thereof to satisfy the Statute of Frauds,

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(*r*) *Hindle* v. *Brown* (1908), 98 L. T. 791, C. A.
(*s*) *Cooke* v. *Wilson* (1856), 1 C. B. (N.S.) 153 ; 26 L. J. C. P. 15 ; 107 R. R. 607 ; *Clay* v. *Southern* (1852), 7 Ex. 717 ; 21 L. J. Ex. 202 ; *Brandt* v. *Morris*, [1917] 2 K. B. 784, C. A.
(*t*) *Short* v. *Spackman* (1831), 2 B. & Ad. 962.
(*u*) *Williams* v. *Millington* (1788), 1 H. Bl. 81.
(*a*) *Rayner* v. *Grote* (1846), 16 L. J. Ex. 79 ; 15 M. & W. 359.
(*b*) *Schmaltz* v. *Avery* (1851), 20 L. J. Q. B. 228 ; *Harper* v. *Vigers*, [1909] 2 K. B. 549 ; 78 L. J. K. B. 867. See however, Illustration 6.

s. 17 (*c*). Some of the Judges in this case laid down that he had no right to sue because no contract had been made with him (*d*).

7. A broker sent a contract note in the following form : " I have this day sold you, on account of B, etc. " (signed) " A B, broker." Held, that the broker had no right of action in his own name against the buyer for refusing to accept the goods (*e*). So, where a broker sent a contract note as follows : " Mr. L., I have this day bought in my own name for your account, of A. K. T., etc." (signed) "A B, broker "—it was held that he had no right to sue L. for the price (*f*).

8. A shipmaster signs bills of lading merely as agent for the owners. He cannot sue in his own name for freight due under the bills of lading, not having contracted personally (*g*). Nor can he sue on an implied contract to pay demurrage (*h*).

9. The manager of a mutual insurance association subscribes a policy on behalf of the members of the association. He cannot sue in his own name for contributions due from the member effecting the policy, though the rules of the association purport to give him such a power (*i*).

10. By an agreement in writing, in consideration of the letting of certain tolls by commissioners, A undertook to pay the rent to the treasurer of the commissioners. Held, that the treasurer had no right to sue in his own name for the rent, the contract being made in the names of the principals (*k*).

11. On a sale of land by a corporation, the mayor signed a contract " on behalf of himself and the rest of the burgesses and commonalty of the borough". The conditions provided that the corporation should convey, and a deposit be paid to the mayor. Held, that the mayor could not sue in his own name for breach of the contract (*l*).

12. A bill of exchange is restrictively indorsed to a banker as agent for collection. He cannot sue on the bill (*m*).

13. A, acting as *del credere* agent on behalf of B, a timber exporter, sold a cargo of timber to C. A, in accordance with the contract of agency, paid to B the price of the timber, less A's commission ; and, in accordance with the contract of sale, C accepted bills of exchange drawn by A for the price of the timber. When the timber arrived, C rejected it on the ground that it was not as specified, and it was found that he was entitled so to do. C dishonoured his acceptances. Held, that A was not the trustee or agent of B in respect of A's rights as holder of the bills of exchange ; that there was no failure of consideration for the bills, which were separate contracts between A and C, and were not affected by the failure of consideration under the

(*c*) See now Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4.
(*d*) *Sharman* v. *Brandt* (1871), L. R. 6 Q. B. 720 ; 40 L. J. Q. B. 312, Ex. Ch.
(*e*) *Fairlie* v. *Fenton* (1870), L. R. 5 Ex. 169 ; 39 L. J. Ex. 107.
(*f*) *Fawkes* v. *Lamb* (1862), 31 L. J. Q. B. 98.
(*g*) *Repetto* v. *Millar's, etc., Forests*, [1901] 2 K. B. 306 ; 70 L. J. K. B. 561. Comp. *Cawthron* v. *Trickett* (1864), 33 L. J. C. P. 182 ; 13 C. B. (N.S.) 754.
(*h*) *Brouncker* v. *Scott* (1811), 4 Taunt. 1.
(*i*) *Evans* v. *Hooper* (1875), 1 Q. B. D. 45 ; 45 L. J. Q. B. 206, C. A.
(*k*) *Pigott* v. *Thompson* (1802), 3 B. & P. 147.
(*l*) *Bowen* v. *Morris* (1810), 2 Taunt. 374, Ex. Ch. And see *Teed* v. *Elworthy* (1811), 4 East 210 ; *Lucas* v. *Beale* (1851), 20 L. J. C. P. 134 ; 10 C. B. 739.
(*m*) *Williams* v. *Shadbolt* (1885), 1 T. L. R. 417.

contract for sale of the timber ; and that C was liable to A for the amount of the bills (*n*).

## Article 131

### INTERVENTION OF, OR SETTLEMENT WITH, THE PRINCIPAL

Except as in this Article provided, the right of an agent to sue on a contract made on behalf of his principal ceases on the intervention of the principal, and a settlement with or set-off against the principal may be set up by way of defence to an action by the agent on the contract (*o*).

Provided that, where the agent has, as against the principal, a right of lien on the subject-matter of the contract, the right of the agent to sue on the contract has priority, so long as the claim secured by the lien remains unsatisfied, to that of the principal (*p*) ; and a settlement with, or set-off against, the principal is no defence to an action by the agent on the contract where such settlement or set-off would operate to the prejudice of the claim secured by the lien, unless the defendant were induced by the terms or conditions of the contract, or by the conduct of the agent, to believe that the agent acquiesced in a settlement being made with the principal, or that the defendant would be entitled to such right of set-off (*q*).

*Illustrations*

1. A shipmaster chartered his ship in his own name, and the owner demanded and received from the charterer the freight due under the contract. Held, that the master could not maintain an action against the charterer for such freight, though he had given him notice not to pay it to anyone but himself (*r*).

2. A factor sells, in his own name, goods on which he has a lien for advances. While the advances are unpaid, the factor's right to sue the purchaser and compel payment has priority to that of the principal or his trustee in bankruptcy (*s*).

3. A broker sells, in his own name, goods on which he has made advances. The buyer has no right, in an action by the broker for the price, to set off a debt due to him from the principal (*a*).

4. An auctioneer sued for the price of goods sold and delivered. The defendant pleaded that the plaintiff acted as an auctioneer, and that the defendant had paid the principal for the goods before action. Held, that the plea was bad, because the auctioneer would have had, as against the principal,

(*n*) *Churchill* v. *Goddard*, [1937] 1 K. B. 92 ; 105 L. J. K. B. 571, C. A.
(*o*) Illustration 1. *Sadler* v. *Leigh* (1815), 4 Camp. 195 ; *Rogers* v. *Hadley* (1861), 32 L. J. Ex. 241 ; 2 H. & C. 227. And see *Dickenson* v. *Naul* (1833), 4 B. & Ad. 638. See §§ 308, 371 of the American Restatement.
(*p*) Illustration 2.
(*q*) Illustrations 3 to 6. And see *Tagart* v. *Marcus* (1888), 36 W. R. 469.
(*r*) *Atkinson* v. *Cotesworth* (1825), 3 B. & C. 647.
(*s*) *Drinkwater* v. *Goodwin* (1775), Cowp. 251.
(*a*) *Atkyns* v. *Amber* (1796), 2 Esp. 493.

a lien on the proceeds for charges, etc. (*b*). The defendant should have shown that, either by the conditions of sale or by facts accruing subsequently, payment to the principal was permitted in discharge of the plaintiff's claim.

5. An auctioneer, on behalf of A, sold goods to B. A was indebted to B, and there was an agreement between them before the sale that the price of any goods bought by B should be set off against the debt, but the auctioneer had no notice of the agreement. The auctioneer permitted B to take away the goods, thinking that he was going to pay for them, B thinking that he was taking them in pursuance of his agreement with A. The auctioneer paid A on account, and after receiving notice of the agreement between A and B, paid A the balance of the proceeds of the sale, such balance exceeding the amount of B's purchases. The auctioneer subsequently sued B for the price of the goods. Held, that the auctioneer's charges having been paid before action, and he having had notice of the agreement between A and B at the time of his payment to A (exceeding the amount for which he was suing B), the settlement between A and B constituted a good defence (*c*). Here, the auctioneer was not really prejudiced by the settlement with the principal.

6. Goods belonging to A and B were sold by auction at A's house, and were described in the catalogue as A's property. C bought some of the goods and settled with A, the auctioneer having permitted him to take away the goods without giving him notice not to pay A. D also bought goods and was similarly permitted to take them away. The auctioneer brought actions against C and D. Held, that the settlement between C and A was a good defence (*d*), and that D was entitled to set off a debt due to him from A (*e*).

## Article 132

### RIGHTS OF DEFENDANT WHERE AGENT SUES IN OWN NAME

Where an agent sues in his own name on a contract made on behalf of his principal—

(a) any statements which he has himself made, as well as the statements of the principal, may be used in evidence against him (*f*) ;

(b) the defendant may avail himself of every defence, including that of set-off, which would have been available against the plaintiff if he had been suing on a contract made on his own behalf, even although the defence would not have been available in an action by the principal on the contract (*g*) ; and

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(*b*) *Robinson* v. *Rutter* (1855), 24 L. J. Q. B. 250 ; 4 E. & B. 954.

(*c*) *Grice* v. *Kenrick* (1870), L. R. 5 Q. B. 340 ; 39 L. J. Q. B. 175. Comp. *Manley* v. *Berkett*, [1912] 2 K. B. 329 ; 81 L. J. K. B. 1232.

(*d*) *Coppin* v. *Walker* (1816), 2 Marsh. 497.

(*e*) *Coppin* v. *Craig* (1816), 2 Marsh. 501. See also *Holmes* v. *Tutton* (1855), 24 L. J. Q. B. 346 ; 5 E. & B. 65.

(*f*) *Smith* v. *Lyon* (1813), 3 Camp. 465 ; *Bauerman* v. *Radenius* (1798), 7 T. R. 663 ; *Welstead* v. *Levy* (1831), 1 M. & Rob. 138. See § 375 of the American Restatement.

(*g*) *Gibson* v. *Winter* (1833), 2 L. J. K. B. 130 ; 5 B. & Ad. 96.

(c) the defendant is entitled to discovery to the same extent as if the principal were a party to the action, and to have the action stayed till such discovery is made, even in the case of a foreign principal (*h*).

### Article 133

RIGHT OF AGENT TO SUE FOR MONEY PAID BY MISTAKE, ETC.

Where an agent pays money on his principal's behalf under a mistake of fact, or in respect of a consideration which fails, or in consequence of some fraud or wrongful act of the payee or otherwise under such circumstances that the payee is liable to repay the money, the agent may in his own name sue the payee for its recovery (*i*).

### Article 134

NO RIGHT OF ACTION FOR PROMISED BRIBES

No action can be maintained by an agent for the recovery of any property or money promised to be given to him by way of a bribe, whether he was, in fact, induced by such promise to depart from his duty or not (*k*).

## SECT. 4.—*Liabilities of Agents in Respect of Wrongs Committed on Principal's Behalf*

### Article 135

AGENT PERSONALLY LIABLE FOR ALL WRONGS COMMITTED BY HIM

Where loss or injury is caused to any third person, or any penalty is incurred, by any wrongful act or omission of an agent while acting on behalf of the principal, the agent is personally liable therefor, whether he be acting with the authority of the principal or not, unless the authority of the principal justify the wrong (*l*), to the same extent as if he were acting on his own behalf (*m*).

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(*h*) *Willis* v. *Baddeley*, [1892] 2 Q. B. 324 ; 61 L. J. Q. B. 769, C. A. See, however, *Portugal* (*Queen of*) v. *Glyn* (1837), 7 C. & F. 466, H. L.

(*i*) *Stevenson* v. *Mortimer* (1778), Cowp. 805 ; *Holt* v. *Ely* (1853), 1 E. & B. 795 ; *Langstroth* v. *Toulmin* (1822), 3 Stark. 145 ; *Colonial Bank* v. *Exchange Bank* (1885), 11 App. Cas. 84 ; 55 L. J. P. C. 14, P. C. In such a case, either the principal or the agent may sue.

(*k*) *Harrington* v. *Victoria Dock Co.* (1878), 3 Q. B. D. 549 ; 47 L. J. Q. B. 594 ; *Laughland* v. *Millar* (1904), 6 F. 413.

(*l*) See Illustrations 10 and 11.

(*m*) Illustrations 1 to 12. *Stevens* v. *Mid. Ry.* (1854), 10 Ex. 352 ; 23 L. J. Ex. 328 (malicious prosecution). See also Articles 136 and 137. The principal may be liable jointly and severally with the agent. See Articles 102 and 107. See § 343 and §§ 344 to 360 of the American Restatement.

This Article applies to public agents (*n*) : the Crown can be sued in the same way as a private person (*o*) : provided also, that no public agent is liable for loss or injury caused to a member, resident abroad, of any foreign State by any act outside the realm authorised or ratified by the Crown or government (*p*).

*Illustrations*

1. An agent signed a distress warrant, and after the warrant was issued, but before it was executed, refused a tender of the rent. Held, that the agent was personally liable for the illegal distress (*q*).

2. The manager of a bank signed a letter, as such, falsely and fraudulently representing that the credit of a certain person was good. Held, that the manager was personally liable in an action for deceit (*r*). All persons directly concerned in the commission of a fraud are personally liable, though acting on behalf of others (*s*). But, in the absence of fraud, an agent is not personally liable for misrepresentations made by him on behalf of his principal (*t*).

3. A solicitor who is employed to conduct the sale of an estate conceals an encumbrance from the purchaser. He is personally liable for the concealment (*u*).

4. A solicitor, on his client's instructions, presents a bankruptcy petition against A, knowing that A has not committed any act of bankruptcy. An action is maintainable against the solicitor for maliciously, and without reasonable and probable cause, presenting such petition, and causing A to be adjudged bankrupt (*x*).

5. A, a printer, is employed to print pictures which are an infringement of copyright. A, though not aware of the infringement of copyright, is liable, as well as his employers, for penalties for the infringement (*y*).

6. A bailiff, employed to levy a distress, illegally distrains a lodger's goods. He is personally liable under the Law of Distress Amendment Act, 1908 (*z*).

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(*n*) Illustration 13. *Hamilton* v. *Clancy*, [1914] 2 Ir. R. 514 (negligence of sub-postmaster in transmission of telegram). The defence of " act of state " is not available against a British subject : *Entick* v. *Carrington* (1765), 19 St. Tr. 1030 ; *Sinclair* v. *Broughton* (1882), 47 L. T. 170, C. A.

(*o*) See Articles 90, 101 and 115. Public agents are not liable in their official capacity for the wrongful acts of subordinates : *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178 ; 75 L. J. K. B. 366, C. A.

(*p*) *Buron* v. *Denman* (1848), 2 Ex. 167 ; 76 R. R. 554 ; *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613 ; 75 L. J. K. B. 418 ; *Johnstone* v. *Pedlar*, [1921] A. C. 262 ; 90 L. J. P. C. 181, H. L.

(*q*) *Bennett* v. *Bayes* (1860), 29 L. J. Ex. 224 ; 5 H. & N. 391 ; 102 R. R. 654.

(*r*) *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301 ; 43 L. J. Q. B. 56, Ex. Ch.

(*s*) *Cullen* v. *Thomson* (1862), 4 Macq. H. L. Cas. 424 ; *Bulkeley* v. *Dunbar* (1792), 1 Anstr. 37 ; *Davis* v. *Carter* (1887), 3 T. L. R. 88 ; *Brydges* v. *Branfill* (1841), 12 Sim. 369 ; 56 R. R. 71.

(*t*) *Eaglesfield* v. *Londonderry* (1876), 38 L. T. 303, H. L.

(*u*) *Arnot* v. *Biscoe* (1748), 1 Ves. 95 ; *Clark* v. *Hoskins* (1867), 36 L. J. Ch. 689 ; *Peto* v. *Blades* (1814), 5 Taunt. 657.

(*x*) *Johnson* v. *Emerson* (1871), L. R. 6 Ex. 329 ; 40 L. J. Ex. 201.

(*y*) *Baschet* v. *London Illustrated Standard Co.*, [1900] 1 Ch. 73 ; 69 L. J. Ch. 35. Comp. *Kelly's Directories* v. *Gavin*, [1902] 1 Ch. 631 ; 71 L. J. Ch. 405, C. A.

(*z*) 8 Edw. 7, c. 53, s. 2 ; *Lowe* v. *Dorling*, [1906] 2 K. B. 772 ; 75 L. J. K. B. 1019, C. A., affirming, [1905] 2 K. B. 501, decided under the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 76).

7. A ship is fitted with pumps which are an infringement of a patent. An injunction may be granted against the master, restraining him from using the pumps, or otherwise infringing the patent (*a*). But where a custom house agent merely passed through the custom house an article infringing a patent, and obtained permission for landing and storing it in magazines belonging to the principals, who were the importers, it was held that the acts of the agent did not amount to an exercise or user of the patent, and that therefore no action could be maintained against him in respect of the infringement (*b*).

8. The directors of a company negligently or knowingly (*c*) pay dividends out of capital. They are jointly and severally liable to the creditors of the company (*d*).

9. An agent converts goods of a third person to his principal's use. He is liable to the true owner for their value, even if he acted in good faith and in the belief that his principal was the owner (*e*). If, in such a case, the owner elect to waive the tort, and proceed against the agent for an account, the agent is only liable to account for so much of the proceeds of the converted property as still remains in his hands, and not for what he has duly handed over in the course of his agency to the principal (*f*).

10. *Agent acting as executor* de son tort.—An agent of an executor *de son tort* collects assets, and pays them over to his principal. The agent is personally liable to account for the assets to the right executor or administrator, or to the beneficiaries (*g*). But an agent who acts by the authority of an executor (even before probate) or of a person who is subsequently granted letters of administration is not liable to account as an executor *de son tort*, because the title of the executor dates from, and that of the administrator relates back to, the time of the death (*h*).

11. An agent, on behalf of his principal, but without the principal's authority, distrains the goods of a third person. The principal ratifies the distress, which is justifiable at his instance. The agent ceases to be liable, his act being justified by the ratification (*i*).

12. *Distinction between trespass and case.*—A solicitor, being retained to sue for a debt, by mistake and without malice takes all the proceedings to judgment and execution against another person of the same name as the debtor ; or, having obtained judgment against the debtor, by mistake and without malice issues execution against another person of the same name. The solicitor is not liable for the wrongful seizure, unless he directed the

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(*a*) *Adair* v. *Young* (1879), 12 Ch. D. 13 ; *Heugh* v. *Abergavenny* (1874), 23 W. R. 40.
(*b*) *Nobel's Explosives Co.* v. *Jones* (1882), 8 App. Cas. 5 ; 52 L. J. Ch. 339, H. L.
(*c*) See *Dovey* v. *Cory*, [1901] A. C. 477 ; 70 L. J. Ch. 753, H. L.
(*d*) *Re National Funds Ass. Co.* (1878), 10 Ch. D. 118 ; 48 L. J. Ch. 163.
(*e*) *Perkins* v. *Smith* (1752), 1 Wils. 328 ; *Cranch* v. *White* (1835), 4 L. J. C. P. 113 ; 1 Scott 314 ; *Stephens* v. *Elwall* (1815), 4 M. & S. 259. And see Article 136 ; Article 71, Illustration 5.
(*f*) *Re Ely, ex p. Trustee* (1900), 48 W. R. 693, C. A.
(*g*) *Sharland* v. *Mildon* (1846), 5 Hare 469 ; 15 L. J. Ch. 434 ; *Padget* v. *Priest* (1787), 2 T. R. 97 ; *Coote* v. *Whittington* (1873), L. R. 16 Eq. 534 ; 42 L. J. Ch. 846.
(*h*) *Sykes* v. *Sykes* (1870), L. R. 5 C. P. 113 ; 39 L. J. C. P. 179 ; *Hill* v. *Curtis* (1866), 35 L. J. Ch. 133.
(*i*) *Hull* v. *Pickersgill* (1819), 1 B. & B. 282. And see *Anderson* v. *Watson* (1827), 3 C. & P. 214.

sheriff to seize the goods of the wrong person (*k*). But where a solicitor directs the seizure of particular goods, he is personally liable if the seizure turn out to be wrongful (*l*). So, where a solicitor directs or personally takes part in the execution of a warrant for arrest, he is liable in an action for false imprisonment, if the warrant be illegal (*m*). This distinction is founded on the difference between the old actions of trespass and case. Trespass would not lie unless the injury was a direct consequence of the act of the defendant, but malice was unnecessary. Case would lie for indirect injuries, but malice was essential. The distinction is still important, for, although actions are not now classified under particular heads and forms, the Judicature Acts have not created any new causes of action.

13. A public agent threatens to do an act, purporting to be in pursuance of statutory powers, but in fact outside the limits of such powers. He may be restrained by injunction at the instance of a person aggrieved (*n*).

## Article 136

### CONVERSION BY INNOCENT AGENT

Where an agent has the possession or control of goods, and—

(a) sells and delivers, or otherwise deals with the possession of and assumes to deal with the property in the goods, without the authority of the true owner (*o*) ; or

(b) refuses without qualification to deliver possession to the true owner on demand (*p*) ; or

(c) transfers possession to his principal or any other person except the true owner, with notice of the claim of the true owner (*q*)—

he is guilty of conversion and is liable to the true owner for the value of the goods, even if he obtained possession from the apparent owner, and acted in good faith on the authority of the apparent owner (*r*). Provided, that this does not apply to acts done in good faith, and without notice of the claim of the true owner, on the authority of a mercantile agent, or of a buyer or seller, in possession of goods or of the documents of title thereto with the consent of the true owner, within the meaning of the Factors Act,

(*k*) *Davies* v. *Jenkins* (1843), 1 D. & L. 321 ; 12 L. J. Ex. 386 ; *Childers* v. *Wooler* (1860), 29 L. J. Q. B. 129 ; 2 E. & E. 287 ; *Collins* v. *Evans* (1844), 5 Q. B. 820, Ex. Ch. Comp. *Clissold* v. *Cratchley*, [1910] 2 K. B. 244 ; 79 L. J. K. B. 635.

(*l*) *Rowles* v. *Senior* (1846), 8 Q. B. D. 677 ; *Davies* v. *Jenkins*, *supra* ; *Meredith* v. *Flaxman* (1831), 5 C. & P. 99.

(*m*) *Green* v. *Elgie* (1843), 5 Q. B. 99 ; 14 L. J. Q. B. 162 ; *Codrington* v. *Lloyd* (1838), 8 A. & E. 449 ; *Eggington* v. *Litchfield* (1855), 24 L. J. Q. B. 360 ; 5 E. & B. 100.

(*n*) *Nireaha Tamaki* v. *Baker*, [1901] A. C. 561 ; 70 L. J. P. C. 66, P. C. See also *China Mutual Steam Nav. Co.* v. *Maclay*, [1918] 1 K. B. 33 ; 87 L. J. K. B. 95.

(*o*) Illustrations 1 to 5. See also on this subject generally § 349 of the American Restatement.

(*p*) Illustration 8.

(*q*) Illustration 5. *Powell* v. *Hoyland* (1851), 6 Ex. 67 ; 20 L. J. Ex. 82 ; *Union Credit Bank* v. *Mersey Docks, etc., Board*, [1899] 2 Q. B. 205 ; 68 L. J. Q. B. 842.

(*r*) Illustrations 1 to 5.

1889 (*s*). Provided also, that where a banker in good faith, and without negligence, receives payment for a customer of a cheque crossed generally or specially to himself and the customer has no title, or a defective title thereto, the banker does not incur any liability to the true owner of the cheque by reason only of having received such payment (*t*).

But an agent is not guilty of conversion who, in good faith, merely—

(a) contracts on behalf of his principal to sell goods of which he has neither possession nor control (*u*) ; or

(b) by the authority of the apparent owner, and without notice of the claim of the true owner, deals with the possession of, without assuming to deal with the property in, the goods (*x*) ; or

(c) refuses to deliver to the true owner goods in his possession by the authority of the apparent owner in such terms that the refusal does not amount to a repudiation of the title of the true owner (*y*).

Anyone who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or for that of any other person, is guilty of a conversion, and it is no answer to say that he was acting on the authority of another person who himself had no authority to dispose of them (*a*).

*The Position of Bankers*

A banker who collects a cheque, the indorsement to which has been forged, on behalf of a person who is not a customer of the bank, and who has no title to the cheque, is guilty of conversion of the cheque, and is liable to the true owner for the amount thereof (*b*). But by s. 82 of the Bills of Exchange Act, 1882, the banker is not so liable if in good faith and without negligence he collects a crossed cheque on behalf of a customer (*c*). By s. 1 of the Bills

(*s*) 52 & 53 Vict. c. 45 ; *Shenstone* v. *Hilton*, [1894] 2 Q. B. 452 ; 63 L. J. Q. B. 584. But see *Waddington* v. *Neale* (1907), 96 L. T. 786.

(*t*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 82.

(*u*) *Turner* v. *Hockey* (1887), 56 L. J. Q. B. 301 ; *Barker* v. *Furlong*, [1891] 2 Ch. 172 ; 60 L. J. Ch. 368 ; *Cochrane* v. *Rymill* (1879), 40 L. T. 744, C. A.

(*x*) Illustration 6. *Union Credit Bank* v. *Mersey Docks, etc., Board*, [1899] 2 Q. B. 205 ; 68 L. J. Q. B. 842.

(*y*) Illustration 7.

(*a*) Illustration 2. *Union Credit Bank* v. *Mersey Docks, etc., Board*, [1899] 2 Q. B. 205; 68 L. J. Q. B. 842.

(*b*) *G. W. Ry.* v. *L. & C. Bank*, [1901] A. C. 414 ; 70 L. J. K. B. 915, H. L. ; *Arnold* v. *Cheque Bank* (1876), 1 C. P. D. 578 ; 45 L. J. C. P. 562 ; *Kleinwort* v. *Comptoir National d'Escompte*, [1894] 2 Q. B. 157 ; 63 L. J. Q. B. 674 ; *Mathews* v. *Brown* (1894), 63 L. J. Q. B. 494 ; *Lacave* v. *Crédit Lyonnais*, [1897] 1 Q. B. 148 ; 66 L. J. Q. B. 266 ; *North and South Wales Bank* v. *Macbeth* ; *Same* v. *Irvine*, [1908] A. C. 137 ; 77 L. J. K. B. 464, H. L.

(*c*) 45 & 46 Vict. c. 61 ; *Clarke* v. *L. & C. Banking Co.*, [1897] 1 Q. B. 552 ; 66 L. J. Q. B. 354 ; *Akrokerri Mines* v. *Economic Bank*, [1904] 2 K. B. 465 ; 73 L. J. K. B. 742 ; *Importers Co.* v. *Westminster Bank*, [1927] 2 K. B. 297 ; 96 L. J. K. B. 919, C. A. As to negligence, see *Morison* v. *L. C. & W. Bank*, [1914] 3 K. B. 357 ; 83 L. J. K. B. 1202, C. A. ; *Crumplin* v. *L. J. S. Bank* (1913), 109 L. T. 856 ; *Ladbroke* v. *Todd*

of Exchange (Crossed Cheques) Act, 1906 (*d*), a banker receives payment for a customer within the meaning of the enactment notwithstanding that he credits the customer's account with the amount of the cheque before receiving payment thereof (*e*). But a cheque crossed for the first time by the banker is not a crossed cheque within the meaning of the Act (*e*).

*Illustrations*

1. An auctioneer was instructed to sell by auction furniture which the possessor and apparent owner had assigned by bill of sale to a third person. The auctioneer, who had no notice of the assignment, sold the furniture at the residence of the assignor, and, in the ordinary course of business, delivered it to the purchasers. Held, that the auctioneer was liable to the assignee for the value of the furniture (*f*).

2. A obtained certain goods by fraud. B, a broker, bought the goods in his own name from A, thinking that they would suit C, a customer of his. B, having sold the goods to C at the same price at which he had bought them from A, merely charging the usual commission, took delivery and conveyed the goods to the railway station, whence they were conveyed to C. The jury found that B bought the goods merely as an agent, in the ordinary course of his business. Held, that B was liable to the true owner for the value of the goods (*g*).

3. A hired certain cabs from B, and obtained advances thereon from an auctioneer. The auctioneer, on A's instructions, and without notice of B's title, in good faith sold the cabs, and after deducting the advances and his expenses, paid the proceeds to A. Held, that the auctioneer was liable to B for the value of the cabs, having had control of them, and having sold them in such a way as to pass the property therein (*h*). Otherwise, if he had not had possession or control of the cabs, and had merely contracted to sell, without delivering them (*h*).

4. An insurance broker effected a policy on behalf of A. A became bankrupt, and after the adjudication instructed the broker to collect money due under the policy and pay it to him. The broker, without notice of the

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(1914), 111 L. T. 43 ; *Bissell* v. *Fox* (1885), 53 L. T. 193, C. A. ; *Hannan's* v. *Armstrong* (1900), 5 Com. Cas. 188 ; *Bevan* v. *Nat. Bank ; Same* v. *C. & C. Bank* (1906), 23 T. L. R. 65 ; *Ross* v. *L. C. W., etc., Bank*, [1919] 1 K. B. 678 ; 88 L. J. K. B. 927 ; *Taxation Commrs.* v. *English, Scottish, etc., Bank*, [1920] A. C. 683 ; 89 L. J. P. C. 181 ; *Underwood* v. *Bank of Liverpool*, [1924] 1 K. B. 775 ; 93 L. J. K. B. 690, C. A. ; *Hampstead Guardians* v. *Barclays Bank* (1923), 39 T. L. R. 229 ; *Lloyds Bank* v. *Chartered Bank*, [1929] 1 K. B. 40 ; 97 L. J. K. B. 609, C. A. ; *Slingsby* v. *District Bank*, [1932] 1 K. B. 544 ; 101 L. J. K. B. 281, C. A. ; *Midland Bank* v. *Reckitt*, [1933] A. C. 1 ; 102 L. J. K. B. 297, H. L. (E.).

(*d*) 6 Edw. 7, c. 17.

(*e*) Making *C. & C. Bank* v. *Gordon*, [1903] A. C. 240 ; 72 L. J. K. B. 451, H. L., in this respect not law.

(*f*) *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495 ; 61 L. J. Q. B. 325, C. A. ; *Barker* v. *Furlong*, [1891] 2 Ch. 172 ; 60 L. J. Ch. 368 ; *Brown* v. *Hickinbotham* (1881), 50 L. J. Q. B. 426, C. A.

(*g*) *Hollins* v. *Fowler* (1872), L. R. 7 Q. B. 616 ; 41 L. J. Q. B. 277 ; affirmed, L. R. 7 H. L. 757 ; 44 L. J. Q. B. 149, H. L.

(*h*) *Cochrane* v. *Rymill* (1879), 40 L. T. 744, C. A. ; *Barker* v. *Furlong*, [1891] 2 Ch. 172 ; 60 L. J. Ch. 368.

bankruptcy, collected the money and paid it to A. Held, that the broker was liable to the trustee in bankruptcy for the amount (*i*).

5. A banker collects for, and pays over to, a customer the amount of a post-office order, to which the customer has no title. The banker is liable for the amount to the true owner (*k*).

6. A husband intrusted goods, which were the separate property of his wife, to an auctioneer for sale. The auctioneer received notice of the wife's claim, and subsequently sold a portion of the goods, and permitted the husband to remove the remainder. Held, that the auctioneer was liable to the wife for the value of the goods removed by the husband, as well as of those which had been sold (*l*).

7. A held a bill of sale over horses in the possession of B. B took the horses to C's repository for sale by auction, and they were entered in the catalogue for sale. Before the sale took place, B sold the horses by private contract in C's yard. The price was paid to C, who deducted his commission and charges, and handed the balance to B, and the horses, on B's instructions, were delivered by C to the purchaser. Held, that C, having merely delivered the horses according to B's orders, and not having himself sold or otherwise assumed to deal with the property in them, was not guilty of a conversion (*m*).

8. An agent in possession of goods by the authority of his principal, on demand by the true owner refuses to deliver them up without an order from the principal, or requires a reasonable time to ascertain whether the person demanding the goods is the true owner. Such a qualified refusal is not a conversion. Otherwise, where the refusal is absolute, or amounts to a setting-up of the principal's title to the goods (*n*).

## Article 137

### LIABILITY FOR BREACH OF TRUST

Where an agent, with notice of a trust, deals with trust money or property coming to his hands in a manner or for purposes inconsistent with the trust (*o*), or is otherwise a party to the commission of a breach of trust (*p*), he is personally liable to the *cestui que trust* in respect of the money or property so dealt with, or for such breach of trust. But an agent who has no knowledge that a breach of trust is being committed is not personally liable merely

(*i*) *McEntire* v. *Potter* (1889), 22 Q. B. D. 438 ; *Pearson* v. *Graham* (1837), 7 L. J. Q. B. 247 ; 6 A. & E. 899 ; 45 R. R. 644.

(*k*) *Fine Art Society* v. *Union Bank* (1886), 17 Q. B. D. 705 ; 56 L. J. Q. B. 70, C. A.

(*l*) *Davis* v. *Artingstall* (1880), 49 L. J. Ch. 609.

(*m*) *National Mercantile Bank* v. *Rymill* (1881), 44 L. T. 767, C. A.

(*n*) *Alexander* v. *Southey* (1821), 5 B. & A. 247 ; *Lee* v. *Bayes* (or *Robinson*) (1856), 25 L. J. C. P. 249 ; 18 C. B. 599 ; 107 R. R. 424 ; *Pillott* v. *Wilkinson* (1864), 34 L. J. Ex. 22 ; 3 H. & C. 345, Ex. Ch. ; *Wilson* v. *Anderton* (1830), 1 B. & Ad. 450.

(*o*) Illustrations 1 and 2. *Cowper* v. *Stoneham* (1893), 68 L. T. 18 ; *Hardy* v. *Caley* (1864), 33 Beav. 365 ; *Magnus* v. *Queensland Bank* (1888), 37 Ch. D. 466 ; 57 L. J. Ch. 413, C. A. ; *Bridgman* v. *Gill* (1857), 24 Beav. 302 ; *Imperial Bank of Canada* v. *Begley*, [1936] 2 All E. R. 367.

(*p*) *Att.-Gen.* v. *Leicester Corpn.* (1844), 7 Beav. 176 ; *Morgan* v. *Stephens* (1861), 3 Giff. 226.

because he acts, as agent, in a transaction which constitutes a breach of trust (*q*).

*Illustrations*

1. No person is permitted to deal with trust funds or property in a manner known by him to be inconsistent with the trust (*r*). A banker transfers trust money from a trust account to the private account of the trustees. He is liable to the beneficiaries for the amount so transferred, whether he acquired any personal benefit from the transaction or not (*r*). Otherwise, if the banker had had no notice that it was trust money (*s*).

2. An agent of an executor applies a fund, which he knows to be part of the estate of the testator, in satisfaction of advances made to the executor for his own business. The agent is personally liable to account for the fund to the beneficiaries under the will (*t*).

## Article 138

AGENTS NOT LIABLE FOR WRONGS OF CO-AGENTS OR SUB-AGENTS

No agent is liable, as such, to any third person for loss or injury caused by the wrongful act or omission of a co-agent, not being his partner, or of a sub-agent, while acting on behalf of the principal, unless he authorised, or was otherwise party or privy to, such wrongful act or omission (*u*).

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(*q*) *Barnes* v. *Addy* (1873), L. R. 9 Ch. 244 ; 43 L. J. Ch. 513 ; *Gray* v. *Johnston* (1868), L. R. 3 H. L. 1 ; *Keane* v. *Robarts* (1819), 4 Madd. 332 ; *Coleman* v. *Bucks & Oxon Bank*, [1897] 2 Ch. 243 ; 66 L. J. Ch. 564 ; *Williams* v. *Williams* (1881), 17 Ch. D. 437.

(*r*) *Pannell* v. *Hurley* (1845), 2 Colly. 241 ; *Foxton* v. *Manchester Building Society* (1881), 44 L. T. 406 ; *Ex p. Kingston, re Gross* (1871), L. R. 6 Ch. 632 ; 40 L. J. Bk. 91 ; *Ex p. Adair, re Gross* (1871), 24 L. T. 198 ; *Bodenham* v. *Hoskyns* (1852), 2 De G. M. & G. 903 ; 21 L. J. Ch. 864. Comp. cases cited in note (*q*), above.

(*s*) *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A. C. 693, P. C. ; *Bank of New South Wales* v. *Goulburn Valley Butter Factory*, [1902] A. C. 543 ; 71 L. J. P. C. 112.

(*t*) *Wilson* v. *Moore* (1834), 1 Myl. & K. 127, 337.

(*u*) *Stone* v. *Cartwright* (1795), 6 T. R. 411 ; *Bear* v. *Stevenson* (1874), 30 L. T. 177, P. C. ; *Weir* v. *Bell* (1878), 3 Ex. D. 238 ; 47 L. J. Ex. 704, C. A. ; *Cargill* v. *Bower* (1878), 10 Ch. D. 502 ; 47 L. J. Ch. 649 ; *Re Denham* (1883), 25 Ch. D. 752. See however, the Companies Act, 1948 (11 & 12 Geo. 6, c. 38), ss. 43, 44, 45, as to the liability of directors, etc., for misrepresentations in a prospectus or notice inviting subscriptions for shares : *Greenwood* v. *Leather Shod Wheel Co.*, [1900] 1 Ch. 421 ; 69 L. J. Ch. 131, C. A. ; *Gerson* v. *Simpson*, [1903] 2 K. B. 197 ; 72 L. J. K. B. 603 C. A. ; *Shepherd* v. *Bray*, [1907] 2 Ch. 571 ; 76 L. J. Ch. 692, C. A. See §§ 351, 361, 362 of the American Restatement.

# CHAPTER X

## DETERMINATION OF AGENCY

### Article 139

DETERMINATION AND REVOCATION OF AGENT'S AUTHORITY

THE authority of an agent is determined—

(a) if given for a particular transaction, by the completion of that transaction (*a*) ;

(b) if given for a limited period, by the expiration of that period (*b*) ;

(c) by the destruction of the subject-matter of the agency (*c*) ;

(d) by the happening of any event rendering the agency unlawful, or upon the happening of which it is agreed between the principal and agent that the authority shall determine (*d*).

The authority of an agent may also be determined, subject to the provisions of Articles 140 to 146—

(a) by the death, lunacy, unsoundness of mind, or bankruptcy of the principal or agent (*e*) ; or, where the principal is a corporation or incorporated company, by the dissolution of the corporation or company (*f*) ;

(b) by notice of revocation given by the principal to the agent (*g*) ;

(c) by the notice of renunciation given by the agent to the principal (*g*).

Where the continuance of the agency may require intercourse with the enemy during a war, the agency is determined by the outbreak of war (*h*) ; so that the retainer of a solicitor ceases when his client becomes an enemy alien (*i*). But it has been held that while the solicitor remains upon the record, service upon him is sufficient, although his client has become an enemy alien (*j*).

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(*a*) Illustrations 1 to 4. See as to this subject generally §§ 105 to 133 and § 106 particularly of the American Restatement.

(*b*) Illustrations 5 and 6. See § 105 of the American Restatement.

(*c*) *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256 ; 47 L. J. Ex. 396, H. L. ; *Northey* v. *Trevillion* (1902), 7 Com. Cas. 201. See § 110 of the American Restatement.

(*d*) See §§ 107 to 109, 115, 116, 124 of the American Restatement.

(*e*) See Articles 142 and 143. See §§ 113, 114, 120 to 123 of the American Restatement.

(*f*) *Salton* v. *New Beeston Cycle Co.*, [1900] 1 Ch. 43 ; 69 L. J. Ch. 20.

(*g*) See Article 144. See §§ 117 to 119 of the American Restatement.

(*h*) See *Sovfracht (V/O)* v. *Van Udens Scheepvart en Agentuur Matschappij (N. V. Gebr)*, [1943] A. C. 203, *per* Lord Porter at pp. 253-255 ; 112 L. J. K. B. 32 ; *Stevenson* v. *Aktiengesellschaft für Cartonnagen-Industrie*, [1918] A. C. 239 ; 87 L. J. K. B. 416 ; *Jebara* v. *Ottoman Bank*, [1927] 2 K. B. 254 ; 96 L. J. K. B. 581, C. A. ; [1928] A. C. 269 ; 97 L. J. K. B. 502, H. L.

(*i*) *Sovfracht, etc.* v. *Van Udens, etc., ubi supra.*

(*j*) *Eichengruen* v. *Mond*, [1940] 1 Ch. 785, C. A.

And an agency is determined when the operation of Military Service Acts makes it illegal or impossible for the agent to perform his agreement (*k*). But the occurrence of war does not, of itself, determine the agency of a subject of an enemy state resident in this country (*l*) ; and it has been held that an irrevocable power of attorney to sell land and give a receipt for the purchase money is not avoided by the donor of the power subsequently becoming an alien enemy (*m*).

*Illustrations*

1. A broker is employed to sell goods. Immediately the contract of sale is completed, he is *functus officio*, and cannot subsequently alter the terms of the contract without fresh authority from the principal (*n*).

2. A solicitor is retained to conduct an action. In the absence of express agreement to the contrary, his authority to act for the client ceases at the judgment (*o*).

3. An auctioneer is authorised to sell property. His authority ceases when the sale is completed (*p*).

4. A house agent was employed to let or sell a house. Having let the house, he negotiated for a sale, and subsequently found a purchaser. Held, that he had no authority to sell after having let the house, and that he was not entitled to commission on the sale (*q*).

5. A broker is authorised to sell goods. It may be shown that by the custom of the particular trade such an authority expires with the expiration of the day on which it is given (*r*).

6. A stockbroker is instructed to buy or sell stock or shares, subject to fixed limits. His authority *prima facie* ceases at the expiration of the current account (*s*).

## Article 140

WHEN AUTHORITY IRREVOCABLE (*t*)

Where the authority of an agent is given by deed (*u*), or for valuable consideration (*x*), for the purpose of effectuating any

(*k*) *Marshall* v. *Glanvill*, [1917] 2 K. B. 87 ; 86 L. J. K. B. 767.
(*l*) *Nordman* v. *Rayner* (1916), 33 T. L. R. 87 ; *Schostall* v. *Johnson* (1919), 36 T. L. R. 75. Enemy character depends upon residence, or carrying on business, in enemy territory (*Sovfracht, etc.* v. *Van Udens, etc., supra*).
(*m*) *Tingley* v. *Müller*, [1917] 2 Ch. 144 ; 86 L. J. Ch. 625, C. A. This decision was upon its special facts : ordinarily, the relationship of principal and agent necessitates communication between them ; see *per* Lord Porter in *Sovfracht, etc.* v. *Van Udens, etc., ubi supra*.
(*n*) *Blackburn* v. *Scholes* (1810), 2 Camp. 343 ; 11 R. R. 723.
(*o*) *Macbeath* v. *Ellis* (1828), 4 Bing. 578 ; *Butler* v. *Knight* (1867), L. R. 2 Ex. 109 ; 36 L. J. Ex. 66. And see *R.* v. *Leitrim JJ.*, [1900] 2 Ir. R. 397.
(*p*) *Seton* v. *Slade* (1802), 7 Ves. 265, 276. See also Article 3.
(*q*) *Gillow* v. *Aberdare* (1893), 9 T. L. R. 12, C. A.
(*r*) *Dickinson* v. *Lilwall* (1815), 4 Camp. 279.
(*s*) *Lawford* v. *Harris* (1896), 12 T. L. R. 275.
(*t*) See *Sinfra Aktiengesellschaft* v. *Sinfra, Ltd.*, [1939] 2 All E. R. 675, where this Article was cited with approval. See §§. 138, 139 of the American Restatement.
(*u*) Illustrations 1 and 2.
(*x*) Illustrations 3 to 6.

security (*y*), or of protecting or securing any interest of the agent (*z*), it is irrevocable during the subsistence of such security or interest (*a*). But it is not irrevocable merely because he has an interest in the exercise of it, or has a special property in, or lien for advances upon, the subject-matter thereof, the authority not being given expressly for the purpose of securing such interest or advances (*b*).

Where an agent is employed to enter into any contract, or do any other lawful act involving personal liability, and is expressly or impliedly authorised to discharge such liability on behalf of the principal, the authority becomes irrevocable as soon as the liability is incurred by the agent (*c*).

Where an agent is authorised to pay money on behalf of his principal to a third person, the authority becomes irrevocable as soon as the agent enters into a contract, or otherwise becomes bound, to pay or hold such money to or to the use of such third person (*d*).

Where an agent has a right to sue on a contract made on behalf of his principal, and would be entitled, as against the principal, to a lien on any money or property recovered in respect of such contract or any breach thereof, the authority of the agent to sue and give a discharge for the money or property recoverable in respect of such contract or breach thereof, is irrevocable during the subsistence of the claim in respect of which he would be entitled to such lien (*e*).

An authority expressed by this Article to be irrevocable is not determined by the death (*f*), lunacy, unsoundness of mind, or bankruptcy (*g*) of the principal, and cannot be revoked by him without the consent of the agent.

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(*y*) *Walsh* v. *Whitcomb* (1797), 2 Esp. 565 ; *Smart* v. *Sandars* (1848), 5 C. B. 895 ; 17 L. J. C. P. 258.

(*z*) Illustrations 1 to 8. *Alley* v. *Hotson* (1815), 4 Camp. 325.

(*a*) See *Chinnock* v. *Sainsbury* (1860), 30 L. J. Ch. 409 ; *Frith* v. *Frith*, [1906] A. C. 254 ; 75 L. J. P. C. 50, P. C.

(*b*) Illustrations 3 to 7. *Lepard* v. *Vernon* (1813), 2 V. & B. 51 ; 13 R. R. 13 ; *Frith* v. *Frith*, *supra*.

(*c*) Illustration 9. *Read* v. *Anderson* (1884), 13 Q. B. D. 779 ; 53 L. J. Q. B. 532, C. A. ; *Rhodes* v. *Fielder* (1919), 89 L. J. K. B. 15 ; 122 L. T. 128. The importance of this principle is much diminished by the Gaming Act, 1892. See Article 71.

(*d*) Illustration 10. *Robertson* v. *Fauntleroy* (1823), 8 Moore 10 ; *Burn* v. *Carvalho* (1839), 9 L. J. Ch. 65 ; 4 Myl. & C. 690 ; *Metcalfe* v. *Clough* (1828), 6 L. J. K. B. 281 ; 2 M. & R. 178 ; *Fisher* v. *Miller* (1823), 7 Moore 527 ; *Hodgson* v. *Anderson* (1825), 3 B. & C. 842 ; *Hamilton* v. *Spottiswoode* (1849), 4 Ex. 200 ; 18 L. J. Ex. 393 ; *Gardner* v. *Lachlan* (1838), 4 Myl. & C. 129 ; 8 L. J. Ch. 82. See Article 128, as to when the agent becomes bound to the third person.

(*e*) Illustration 11.

(*f*) Illustration 2. *Lepard* v. *Vernon* (1813), 2 V. & B. 51 ; *Spooner* v. *Sandilands* (1842), 1 Y. & Coll. C. C. 390. See, however, *Watson* v. *King* (1815), 1 Stark. 121, where it was held that a power of attorney, though coupled with an interest, was revoked by the death of the donor.

(*g*) Illustrations 8, 10 and 11, and cases there cited.

*Illustrations*

*Authority Coupled with an Interest*

1. A, being indebted to B, gives him a power of attorney to sell certain land and discharge his debt out of the purchase-money. The power is irrevocable (*h*).

2. A gave his sister a power of attorney to transfer certain stock, intending to give her the beneficial interest therein. Held, that a transfer executed after A's death in pursuance of the power of attorney was valid (*i*).

3. Goods are consigned to a factor for sale, with a certain limit as to price. The factor makes advances to the principal, in consideration of his giving him authority to sell at the market price and retain the advances. The authority is irrevocable (*k*).

4. Goods are consigned to a factor for sale, and he makes advances to the principal on the credit thereof. Subsequently, the principal gives him authority to sell at the market price and retain the advances out of the proceeds. The authority is revocable, not being given for valuable consideration (*k*).

5. Goods are consigned to a factor for sale. He makes advances, in consideration of an agreement by the principal that his authority to sell shall be irrevocable. The authority is irrevocable (*l*). It is a question of fact whether such an agreement was made, and it may be inferred from the circumstances (*m*). In the absence of such an agreement for valuable consideration, the authority of a factor to sell does not become irrevocable by the failure of the principal duly to repay advances made on the security of the goods (*l*).

6. A signs and addresses to B an underwriting letter by which he agrees, in consideration of a commission, to subscribe for a certain number of shares in a company, and authorises B to apply for the shares in his name and on his behalf. B, being a vendor to the company, and therefore having an interest in the raising of the capital, by letter accepts the terms of A's agreement. The authority given to B to apply for the shares is irrevocable, and A is bound to take the shares applied for and allotted in pursuance of the underwriting letter, although in the meantime he has given notice to B and to the company repudiating the agreement (*n*).

7. An auctioneer was authorised to sell goods, and after he had incurred expenses in respect thereof, the principal revoked his authority. Held, that the authority of the auctioneer was not irrevocable merely by reason of his special property in the goods and his lien thereon for advances, and that he

(*h*) *Gaussen* v. *Morton* (1830), 10 B. & C. 731. See also *Re Rose, ex p. Hasluck* (1894), 1 Manson 218 ; *Gurnell* v. *Gardner* (1863), 4 Giff. 626.
(*i*) *Kiddill* v. *Farnell* (1857), 26 L. J. Ch. 818 ; 3 Sm. & G. 428.
(*k*) *Raleigh* v. *Atkinson* (1840), 6 M. & W. 670.
(*l*) *Smart* v. *Sandars* (1848), 5 C. B. 895 ; 17 L. J. C. P. 258 ; *De Comas* v. *Prost* (1865), 3 Moo. P. C. (N.S.) 158, P. C.
(*m*) *De Comas* v. *Prost*, *supra*.
(*n*) *Carmichael's case*, [1896] 2 Ch. 643 ; 65 L. J. Ch. 902, C. A. ; *Re Olympic Reinsurance Co.*, [1920] 2 Ch. 341 ; 89 L. J. Ch. 544, C. A. Comp. *Re Consort, etc., Gold Mines, Stark's and Elliston's cases*, [1897] 1 Ch. 575 ; 66 L. J. Ch. 297, C. A. ; *Re Bultfontein, etc., Mines, ex p. Cox* (1897), 75 L. T. 669, C. A.

was liable to the principal in trespass for going to the premises to sell the goods after notice of the revocation (*o*).

8. The drawer of an accommodation bill, shortly before the bill was due, gave the acceptor money to pay it. He became bankrupt before its maturity. Held, that the authority to pay the bill, being given in performance of an implied contract of indemnity, was irrevocable, and the acceptor was not liable to refund the amount to the trustee in bankruptcy of the drawer (*p*).

9. *Liability incurred by agent in pursuance of authority.*—A employs B to make a bet on his behalf, and authorises him to pay the bet, if he loses it, out of moneys in his hands belonging to A. The authority becomes irrevocable as soon as the bet is made, provided that B would incur loss in his business or suffer actual damage in the event of the bet not being paid (*q*).

10. An agent is authorised to pay to B the proceeds of a sale of certain goods. The agent assents and promises B that he will pay him, or that he will credit the proceeds to his account. The authority is irrevocable, and is not revoked by the principal's bankruptcy (*r*). It is immaterial that B is indebted to the agent, who retains the proceeds against such debt (*s*).

11. *Authority to sue cannot be revoked to prejudice of agent's lien.*—A factor sells goods on behalf of a principal, who afterwards becomes bankrupt. At the time of the bankruptcy the principal is indebted to the factor in respect of advances. The factor may, as against the principal's trustee in bankruptcy, compel the purchaser to pay the price to him, and may set off the amount of the advances ; and his authority to give the purchaser a discharge for the price cannot be revoked by the principal, or by his trustee in bankruptcy (*t*).

## Article 141

### POWERS OF ATTORNEY IRREVOCABLE IN FAVOUR OF PURCHASERS FOR VALUE

Where a power of attorney, created by an instrument executed after December 31, 1882, and given for valuable consideration, is, in the instrument creating it, expressed to be irrevocable, or, whether given for valuable consideration or not, is, in the instrument creating it, expressed to be irrevocable for a fixed time therein specified not exceeding one year from the date of the instrument, then, in favour of a purchaser for valuable consideration—

(a) the power is not revoked at any time, or during the time fixed (as the case may be), either by anything done by the

(*o*) *Taplin* v. *Florence* (1851), 10 C. B. 744.

(*p*) *Yates* v. *Hoppe* (1850), 19 L. J. C. P. 180 ; 9 C. B. 541 ; *Chartered Bank* v. *Evans* (1869), 21 L. T. 407, P. C. See also *Carter* v. *White* (1883), 25 Ch. D. 666 ; 54 L. J. Ch. 138, C. A.

(*q*) Submitted, on the authority of *Read* v. *Anderson* (1884), 13 Q. B. D. 779 ; 53 L. J. Q. B. 532, C. A. The principle of this decision still holds good, though the effect of its application is altered by the Gaming Act, 1892 (55 Vict. c. 9). See Article 72.

(*r*) *Crowfoot* v. *Gurney* (1832), 9 Bing. 372 ; 2 L. J. C. P. 21 ; *Walker* v. *Rostron* (1842), 9 M. & W. 411 ; *Hutchinson* v. *Heyworth* (1838), 9 A. & E. 375.

(*s*) *Dickinson* v. *Marrow* (1845), 14 M. & W. 713.

(*t*) *Drinkwater* v. *Goodwin* (1775), Cowp. 251 ; *Robson* v. *Kemp* (1802), 4 Esp. 233.

donor of the power without the concurrence of the donee, or by the death, disability, or bankruptcy of the donor ;

(b) any act done by the donee, in pursuance of the power, at any time, or during the time fixed (as the case may be), is as valid as if anything done by the donor without such concurrence, or the death, disability, or bankruptcy of the donor, had not been done or happened ;

(c) neither the donee, nor the purchaser, is at any time prejudicially affected by notice of anything done by the donor without the concurrence of the donee, or of the death, disability, or bankruptcy of the donor, at any time, or during the time fixed (as the case may be) (*u*).

## Article 142

### REVOCATION OF AUTHORITY BY DEATH OR INSANITY

Subject to the provisions of Articles 140 and 141, the authority of every agent, whether conferred by deed or not, is determined by the death (*x*), lunacy, or unsoundness of mind (*y*) of either the principal or the agent ; or, where the principal is a corporation or incorporated company, by its dissolution (*z*).

*Illustrations*

1. A undertakes to pay B £100 if B succeeds in selling a picture at a certain price—" no sale, no pay ". B endeavours to sell the picture, and after A's death succeeds in doing so. The representatives of A's estate are not bound by the contract of sale (*a*), but they may ratify it if they think fit (*b*). Even if the representatives ratify the sale, they are not liable to pay B the £100 unless they ratify his contract with A, but they are liable to pay him a reasonable sum for the services performed (*c*).

2. A stockbroker had a continuation account open with a client. The client died, and the broker, failing to get instructions from his representatives, carried over the transactions instead of closing them on or before settling

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(*u*) Law of Property Act, 1925 (15 Geo. 5, c. 20), ss. 126, 127, 205 (1) (xxi).

(*x*) Illustrations 1 to 4. *Shipman* v. *Thompson* (1738), Willes 104, n. ; *Farrow* v. *Wilson* (1869), L. R. 4 C. P. 744 ; 38 L. J. C. P. 326 ; *Cottle* v. *Aldrich* (1815), 4 M. & S. 175 ; *Phillips* v. *Jones* (1888), 4 T. L. R. 401 ; *Houstoun* v. *Robertson* (1816), 6 Taunt. 448 ; *Houstoun* v. *Bordenave* (1816), 6 Taunt. 451. See §§ 120, 121, 123 of the American Restatement. Commission may continue payable after the death of the agent : see Article 64, Illustration 16.

(*y*) See *Drew* v. *Nunn* (1879), 4 Q. B. D. 661 ; 48 L. J. Q. B. 591, C. A. ; *Daily Telegraph Newspaper Co.* v. *M'Laughlin*, [1904] A. C. 776, P. C. See §§ 122, 123 of the American Restatement. As to third persons dealing with the agent, without notice of the insanity, see Article 145, Illustration 2.

(*z*) Illustration 5.

(*a*) *Blades* v. *Free* (1829), 9 B. & C. 167.

(*b*) *Foster* v. *Bates* (1843), 12 M. & W. 226 ; 13 L. J. Ex. 88.

(*c*) *Campanari* v. *Woodburn* (1854), 15 C. B. 400 ; 24 L. J. C. P. 13.

day, and ultimately sold the shares at a loss. It was held that the representatives were entitled to stand by the carrying over sale on the first settling day after the death, and that the broker was liable for the subsequent loss (*d*).

3. A contract of agency for a fixed period is made by or with a firm. The agency is determined by the death of any one of the partners before the expiration of that period (*e*).

4. A solicitor is retained to conduct a divorce suit. The retainer ceases on the death of the client pending the proceedings, and the solicitor cannot recover costs subsequently incurred, even when he had no knowledge of his client's death (*f*).

5. Pending an action against a company, the company was dissolved under the Companies Acts. Held, that the authority of the company's solicitor was determined by the dissolution, though he had no knowledge of it (*g*).

## Article 143

### REVOCATION OF AUTHORITY BY BANKRUPTCY

Subject to the provisions of Articles 140 and 141, the authority of every agent, whether conferred by deed or not (*h*), except an authority to do a merely formal act in completion of a transaction already binding on the principal (*i*), is revoked by the first act of bankruptcy committed by the principal within the three months next preceding the date of the presentation of a bankruptcy petition upon which the principal is afterwards adjudicated bankrupt (*k*).

Provided always that—

(a) Where the authority is given in the course, and for the protection, of mutual dealings between the principal and the agent (*l*), it is not revoked by the bankruptcy of the principal, until either the agent has notice of an available (*m*) act of bankruptcy, or the receiving order is made (*n*) ;

(b) every payment or act (*o*) made to or by, or done by, the agent before the date of the receiving order, is as valid

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(*d*) *Re Overweg, Haas* v. *Durant*, [1900] 1 Ch. 209 ; 69 L. J. Ch. 255.

(*e*) *Tasker* v. *Shepherd* (1861), 6 H. & N. 575 ; 30 L. J. Ex. 207 ; *Re Friend, Friend* v. *Young*, [1897] 2 Ch. 421 ; 66 L. J. Ch. 737. Comp. *Phillips* v. *Hull Alhambra*, [1901] 1 K. B. 59 ; 70 L. J. K. B. 26.

(*f*) *Pool* v. *Pool* (1889), 58 L. J. P. 67 ; *Whitehead* v. *Lord* (1852), 7 Ex. 691 ; 21 L. J. Ex. 239.

(*g*) *Salton* v. *New Beeston Cycle Co.*, [1900] 1 Ch. 43 ; 69 L. J. Ch. 20.

(*h*) *Markwick* v. *Hardingham* (1880), 15 Ch. D. 339, C. A. ; *Ex p. Snowball, re Douglas* (1872), L. R. 7 Ch. 534 ; 41 L. J. Bk. 49.

(*i*) Illustration 5.

(*k*) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 37 ; Illustrations 1 to 4. See §§ 113, 114 of the American Restatement.

(*l*) Illustration 6.

(*m*) *I.e.*, an act of bankruptcy, committed within the three months next preceding the presentation of the petition whereon the receiving order is made : Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 4 (1) and 167.

(*n*) Illustration 6.

(*o*) Payment or delivery to, or payment, conveyance, assignment, contract, dealing, or transaction by or with the agent.

as if his authority had not been revoked by the bankruptcy of the principal, with respect to any third person dealing with him for valuable consideration without notice of any available (*m*) act of bankruptcy by the principal ; and also with respect to the agent provided that at the time when the payment or act is made or done he has no notice of any such act of bankruptcy (*p*).

The question whether the authority of an agent is revoked by his bankruptcy depends upon the nature and terms of his employment (*q*).

*Illustrations*

1. An agent has a general authority to sell and deliver goods belonging to his principal. The principal commits an act of bankruptcy. The authority of the agent is revoked by the act of bankruptcy, provided that the principal is subsequently adjudicated bankrupt upon a petition presented within three months after the date thereof (*r*) ; and if the agent sell the goods after receiving notice of the act of bankruptcy, he is liable to the trustee in bankruptcy for the value of the goods, or for the proceeds, at the option of the trustee (*s*).

2. An agent, in obedience to the instructions of his principal, pays away money belonging to the principal after receiving notice that he has committed an act of bankruptcy. The principal is adjudicated bankrupt upon a petition presented within three months after the act of bankruptcy. The agent is personally liable to repay to the trustee in bankruptcy the amount so paid away (*t*). So, if a banker pay the cheques of a customer after receiving notice that the customer has committed an act of bankruptcy, he cannot charge the customer with, nor prove in the bankruptcy for, the amounts so paid (*u*).

3. An agent, by the direction of his principal, makes a payment which the agent knows will, when completed, constitute an act of bankruptcy by the principal. The agent is not liable to the trustee in the subsequent bankruptcy merely by reason of the payment so made, because the act of bankruptcy had not been committed at the time when the payment was made (*x*).

4. A solicitor is authorised to conduct certain proceedings, and a sum of money is paid to him by the client for that purpose. The solicitor incurs expenses and costs, and then, after receiving notice of an act of bankruptcy by the client, appears on his behalf in opposition to a bankruptcy petition. The client is adjudicated bankrupt. The solicitor must repay to the trustee in bankruptcy the amount received from the bankrupt, after deducting the costs and expenses incurred prior to the notice of the act of bankruptcy (*y*).

(*p*) *Ibid.*, s. 45 ; Illustrations 4, 7 and 8.

(*q*) See *M'Call* v. *Australian Meat Co.* (1870), 19 W. R. 188 ; *Phelps* v. *Lyle* (1840), 8 L. J. Q. B. 236 ; 10 A. & E. 113 ; *Hudson* v. *Granger* (1821), 5 B. & A. 27.

(*r*) *Pearson* v. *Graham* (1837), 6 A. & E. 899 ; 7 L. J. Q. B. 247 ; *Kynaston* v. *Crouch* (1845), 14 L. J. Ex. 324 ; 14 M. & W. 266 ; Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 37. See also *McEntire* v. *Potter* (1889), 22 Q. B. D. 438.

(*s*) *King* v. *Leith* (1787), 2 T. R. 141.

(*t*) *Re Lamb, ex p. Gibson* (1887), 55 L. T. 817.

(*u*) *Vernon* v. *Hankey* (1787), 2 T. R. 113 ; *Hankey* v. *Vernon* (1787), 3 Bro. C. C. 313 ; *Ex p. Sharp* (1844), 3 M. D. & De G. 490.

(*x*) *Ex p. Helder, re Lewis* (1883), 24 Ch. D. 339.

(*y*) *Re Whitlock* (1893), 63 L. J. Q. B. 245 ; *Re Pollitt*, [1893] 1 Q. B. 455 ; 62

5. An agent was by power of attorney given authority to execute an endorsement of sale on the register of a ship when she returned home. Held, that the power was not revoked by the bankruptcy of the donor, the act being merely a formal one, which the principal, though a bankrupt, might have been compelled to do (*z*).

6. An agent is authorised to receive the purchase-money of an estate and place it to the credit of the principal in an account of mutual dealings between the principal and agent. The agent receives the money after an act of bankruptcy by the principal, but before the date of the receiving order, without notice of the act of bankruptcy. The money becomes an item in the account between the principal and agent, and may be set off by the agent as against the trustee in bankruptcy (*a*). A delivery of property to an agent, with authority to convert it into money and receive the proceeds, is giving credit to the agent within the meaning of the mutual credit clause of the Bankruptcy Act, 1914, and he is entitled, on the bankruptcy of the principal, to exercise the right of set-off given by that clause, though the authority has not been exercised and the property is still unconverted at the time of the bankruptcy (*b*).

7. After an act of bankruptcy, but before the date of the receiving order, property of the bankrupt is conveyed to a purchaser for valuable consideration, in pursuance of a power of attorney given by the bankrupt, the purchaser acting in good faith, without notice of the act of bankruptcy. The purchaser has a good title as against the trustee in bankruptcy (*c*).

8. An agent, on behalf of his principal, enters into a contract after an act of bankruptcy by the principal, but before the date of the receiving order, the other contracting party having had no notice of any act of bankruptcy by the principal. The contract is as valid against the trustee in bankruptcy as it would have been against the principal if he had not become bankrupt (*d*).

## Article 144

### DETERMINATION OF AUTHORITY BY NOTICE OF REVOCATION OR RENUNCIATION

Subject to the provisions of Articles 140 and 141, the authority of an agent, whether conferred by deed or not (*e*) is determined by the principal giving to the agent notice of revocation at any

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L. J. Q. B. 236, C. A. ; *Re Beyts* (1894), 70 L. T. 561 ; *Re Mander, ex p. O. R.* (1902), 86 L. T. 234 ; *Re A Debtor*, [1937] Ch. 92 ; 106 L. J. Ch. 193. Comp. *Re Charlwood*, [1894] 1 Q. B. 643 ; 63 L. J. Q. B. 344.

(*z*) *Dixon* v. *Ewart* (1817), Buck. 94.

(*a*) *Elliott* v. *Turquand* (1881), 7 App. Cas. 79 ; 51 L. J. P. C. 1, P. C., as qualified by Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 31.

(*b*) *Naoroji* v. *Bank of India* (1868), L. R. 3 C. P. 444 ; 37 L. J. C. P. 221 ; *Astley* v. *Gurney* (1869), L. R. 4 C. P. 714 ; 38 L. J. C. P. 357, Ex. Ch. ; *Palmer* v. *Day*, [1895] 2 Q. B. 618 ; 64 L. J. Q. B. 807.

(*c*) *Per cur.* in *Ex p. Snowball, re Douglas* (1872), L. R. 7 Ch. 534 ; 41 L. J. Bk. 49, as qualified by Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 45.

(*d*) *Ex p. MacDonnell* (1819), Buck. 399, as qualified by Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 45.

(*e*) Illustration 1. *Bromley* v. *Holland* (1802), 7 Ves. 28.

time before the authority has been completely exercised (*f*), or by the agent giving to the principal notice of renunciation ; but without prejudice to any claim for damages that the principal or agent may have against the other for breach of the contract of agency (*g*). Where the authority is conferred by two or more principals jointly, it is sufficient if the notice of revocation or renunciation be given by or to any one of the principals (*h*).

*Illustrations*

1. An indenture of lease provided that an agent therein named should have authority to receive the rent on behalf of the lessor, and that his receipt should be a sufficient discharge, during the term thereby granted. Held, that the lessor might revoke the authority during the term, the agent having no interest in the rent (*i*). An authority, though given by deed, may be revoked by a verbal notice of revocation (*k*).

2. An auctioneer is authorised to sell certain goods by auction. His authority may be revoked by the principal at any time before the goods are knocked down to a purchaser (*l*). So, where a broker is authorised to buy or sell goods, the authority may be revoked at any time before the contract of purchase or sale is completed, and where writing is necessary, even after he has verbally contracted to buy or sell the goods (*m*). And, where a broker is authorised to effect a marine insurance policy, the authority may be revoked even after the underwriters have signed the slip, the contract, in consequence of the Stamp Act, 1891 (*n*), ss. 93 and 97, not being binding until the policy is executed (*o*).

3. An agent undertakes to endeavour to sell a picture, and it is agreed that he shall receive remuneration only in the event of a sale. His authority may be revoked after endeavours by him to sell the picture (*p*).

4. Money is deposited with A, to be applied for the use of the poor. The authority may be countermanded at any time before the application of the money, and the money be recovered by the principal from A (*q*). So, money received by an army agent from the Crown for officers' pay may be recalled

(*f*) Illustration 2 to 6. *Freeman* v. *Fairlie* (1838), 8 L. J. Ch. 44.

(*g*) See Articles 43, 57 and 66. *Bovine* v. *Dent* (1904), 21 T. L. R. 82. See also §§ 118 to 119 of the American Restatement. A contract of agency may be determined at will, in the absence of agreement, express or implied, to the contrary : *Alexander* v. *Davis* (1885), 2 T. L. R. 142 ; *Henry* v. *Lowson* (1886), 2 T. L. R. 199 ; *Motion* v. *Michaud* (1892), 8 T. L. R. 447, C. A. ; *Barrett* v. *Gilmour* (1901), 6 Com. Cas. 72 ; *Joynson* v. *Hunt* (1905), 93 L. T. 470, C. A.

(*h*) *Bristow* v. *Taylor* (1817), 2 Stark. 50.

(*i*) *Venning* v. *Bray* (1862), 31 L. J. Q. B. 181 ; 2 B. & S. 502. And see *Doward* v. *Williams* (1890), 6 T. L. R. 316.

(*k*) *The Margaret Mitchell* (1858), Swa. 382 ; *R.* v. *Wait* (1823), 11 Price 518.

(*l*) *Warlow* v. *Harrison* (1859), 1 E. & E. 309 ; 29 L. J. Q. B. 14, Ex. Ch. ; *Manser* v. *Back* (1848), 6 Hare 443 ; *Re Hare and O'More's Contract*, [1901] 1 Ch. 93 ; 70 L. J. Ch. 45.

(*m*) *Farmer* v. *Robinson* (1805), 2 Camp. 338, n.

(*n*) 54 & 55 Vict. c. 39.

(*o*) *Warwick* v. *Slade* (1811), 3 Camp. 127. This applies only to contracts of marine insurance : *Thompson* v. *Adams* (1889), 23 Q. B. D. 361.

(*p*) *Campanari* v. *Woodburn* (1854), 15 C. B. 400 ; 24 L. J. C. P. 13.

(*q*) *Taylor* v. *Lendey* (1807), 9 East 49.

by the Crown at any time before it has been paid to the officers, or the agent has contracted to hold it to their use, though he may have carried it to their credit in his books (*r*).

5. Money is deposited with a stakeholder, to be paid to the winner of a wager. The authority of the stakeholder may be revoked at any time before he has actually paid over the money to the winner, and if he pay it over after notice of revocation he is personally liable to the depositor for the amount (*s*). So, where authority is given to pay money in respect of an unlawful transaction, the authority may be revoked at any time before the money has been paid over, even after it has been credited in account (*t*).

6. A authorised his banker to hold £20 at the disposal of B. The authority of the banker may be countermanded, provided that he has not paid the money to B, nor contracted with him to hold it on his behalf (*u*).

## Article 145

WHEN NOTICE OF REVOCATION TO THIRD PERSONS NECESSARY

Where a principal, by words or conduct, represents, or permits it to be represented, that an agent is authorised to act on his behalf, he is bound by the acts of the agent, notwithstanding the determination of the authority otherwise than by the death (*a*) or bankruptcy (*b*) of the principal, to the same extent as he would have been if the authority had not been determined, with respect to any third person dealing with the agent on the faith of any such representation, without notice of the determination of his authority (*c*).

Where a person holds out another as his agent, the person to whom that other is so held out is justified in dealing with him as such, until he receives notice that the authority has been revoked (*d*).

*Illustrations*

1. A authorises B to purchase goods on his credit, and holds him out to C as his agent for that purpose. C supplies goods to B, on A's credit, after

(*r*) *Brummell* v. *M'Pherson* (1828), 5 Russ. 263.

(*s*) *Hampden* v. *Walsh* (1876), 1 Q. B. D. 189 ; 45 L. J. Q. B. 238 ; *Batson* v. *Newman* (1876), 1 C. P. D. 573, C. A. ; *Diggle* v. *Higgs* (1877), 2 Ex. D. 422 ; 46 L. J. Ex. 721, C. A. ; *Trimble* v. *Hill* (1879), 5 A. C. 342 ; 49 L. J. P. C. 49, P. C. ; *Gatty* v. *Field* (1846), 9 Q. B. 431. These cases are not affected by the Gaming Act, 1892 (55 & 56 Vict. c. 9) : *O'Sullivan* v. *Thomas*, [1895] 1 Q. B. 698 ; 64 L. J. Q. B. 398 ; *Shoolbred* v. *Roberts*, [1900] 2 Q. B. 497 ; 69 L. J. Q. B. 800, C. A. ; *Burge* v. *Ashley*, [1900] 1 Q. B. 744 ; 69 L. J. Q. B. 538, C. A.

(*t*) *Edgar* v. *Fowler* (1803), 3 East 222 ; *Smith* v. *Bickmore* (1812), 4 Taunt. 474 ; *Taylor* v. *Bowers* (1876), 1 Q. B. D. 291 ; 45 L. J. Q. B. 163, C. A. ; *Hastelow* v. *Jackson* (1828), 8 B. & C. 221.

(*u*) *Gibson* v. *Minet* (1824), 9 Moo. 31.

(*a*) See Illustration 4.

(*b*) See Article 143, as to revocation by bankruptcy.

(*c*) Illustrations 1 to 3. *Pole* v. *Leask* (1862), 33 L. J. Ch. 155, H. L. ; *Scarf* v. *Jardine* (1882), 7 App. Cas., at p. 349, H. L. ; *Curlewis* v. *Birkbeck* (1863), 3 F. & F. 894 ; *Abbott* v. *Harrison* (1699), 12 Mod. 346 ; *Ryan* v. *Sams* (1848), 12 Q. B. 460 ; 17 L. J. Q. B. 271. See §§ 134 to 136 of the American Restatement.

(*d*) *Staveley* v. *Uzielli* (1860), 2 F. & F. 30 ; *Ex p. Bright* (1832), 2 Dea. & Ch. 8 ; *Aste* v. *Montague* (1858), 1 F. & F. 264 ; *Willis* v. *Joyce* (1911), 194 L. T. 576.

revocation by A of B's authority to act on his behalf, C having had no notice of such revocation. A is liable to C for the price of the goods, even if B contracted on his own behalf, and did not intend to bind A (*e*).

2. A husband holds out his wife as having authority to pledge his credit, and subsequently becomes insane. A tradesman, on the faith of such holding out, supplies goods to the orders of the wife, without notice of the husband's insanity. The husband is liable for the price of the goods (*f*).

3. A policy was effected through the local agent of an insurance company and notice of a loss was given to him after he had ceased to represent the company. Held, that that was notice to "a known agent of the company" within the meaning of the policy, the assured having no knowledge of the determination of the agency (*g*).

4. A woman lived with a man as his wife for some years and ordered necessaries from a tradesman to whom she had been held out by the man as having authority to pledge his credit. The man went abroad and died there, the woman continuing to order necessaries for herself and children, the tradesman having had no notice of the death. Held, that the woman had the same authority as a wife to bind the man, and that his estate was not liable for the price of the goods (*h*).

## Article 146

### PROTECTION OF AGENT ACTING UNDER POWER OF ATTORNEY WITHOUT NOTICE OF REVOCATION

Where a person makes any payment or does any act in good faith, in pursuance of a power of attorney, he is not liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become subject to disability, or bankrupt, or had revoked the power, if the fact of death, disability, bankruptcy, or revocation were not at the time of the payment or act known to the person making or doing the same. But this does not affect any right against the payee, of any person interested in any money so paid ; and that person has the like remedy against the payee as he would have had against the payer if the payment had not been made by him (*i*).

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(*e*) *Trueman* v. *Loder* (1840), 11 A. & E. 589.
(*f*) *Drew* v. *Nunn* (1879), 4 Q. B. D. 661 ; 48 L. J. Q. B. 591, C. A.
(*g*) *Marsden* v. *City and County Ass. Co.* (1865), L. R. 1 C. P. 232 ; 35 L. J. C. P. 60.
(*h*) *Blades* v. *Free* (1829), 9 B. & C. 167. See, however, *Drew* v. *Nunn*, *supra*, where Brett, L.J. considered, without having to decide, that an executor would be bound.
(*i*) Trustee Act, 1925 (15 Geo. 5, c. 19), s. 29 ; Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 124.

# CHAPTER XI

## CRIMINAL LIABILITY OF PRINCIPAL FOR ACTS OF AGENT

### Article 147

EXCEPT where otherwise expressly or by necessary implication provided by statute or in the case of a public nuisance (*a*) no principal is criminally liable for any act or omission of his agent, unless he authorised or connived at such act or omission (*b*).

*Corporations*

A corporation aggregate cannot be convicted of certain criminal offences, such as treason or other offences for which death or imprisonment is the only punishment (*c*) ; or of felony (*d*) ; or of a crime involving personal violence (*e*) ; or of perjury (*f*). But it may be indicted for a misdemeanour which consists of breach of a duty imposed on it by law, for example, non-repair of a highway (*g*) ; or for a nuisance (*h*) ; or for a misfeasance such as obstruction of a highway (*i*) ; or for libel (*k*), even where express malice is a necessary element in guilt (*l*) ; or for conspiracy to defraud (*m*).

The Interpretation Act, 1889, s. 2 (1) (*n*), provides that in the construction of every enactment relating to an offence punishable on indictment or summary conviction, whether contained in an Act passed before or after the commencement of that Act, the expression " person " shall, unless a contrary intention appears, include a body corporate (*o*).

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(*a*) See Illustration 8.

(*b*) *Dickenson* v. *Fletcher* (1873), L. R. 9 C. P. 1 ; 43 L. J. M. C. 25 ; *Hardcastle* v. *Bielby*, [1892] 1 Q. B. 709 ; 61 L. J. M. C. 101 ; *Taylor* v. *Nixon*, [1910] 2 Ir. R. 94 ; *Wake* v. *Dyer* (1911), 104 L. T. 448. And see Illustration 10.

(*c*) *Director of Public Prosecutions* v. *Kent and Sussex Contractors, Ltd.*, [1944] 1 K. B. 146, *per* Lord Caldecote, L.C.J., at p. 149 ; 113 L. J. K. B. 88.

(*d*) *R.* v. *Birmingham and Gloucester Ry.* (1842), 3 Q. B. 223, *per* Patteson, J.

(*e*) *Ibid.* ; *R.* v. *Cory Bros. & Co.*, [1927] 1 K. B. 810 ; 90 L. J. K. B. 761.

(*f*) *Wych* v. *Neal* (1734), 3 P. Wms. 310.

(*g*) *R.* v. *Birmingham, etc., Ry. supra.*

(*h*) *Pharmaceutical Society* v. *London and Provincial Supply Association* (1880), 5 App. Cas. 857, *per* Lord Blackburn, at p. 870.

(*i*) *R.* v. *Great North of England Ry.* (1846), 9 Q. B. 315.

(*k*) *Whitfield* v. *South Eastern Ry.* (1858), E. B. & E. 115 ; 27 L. J. Q. B. 229.

(*l*) *Triplex Safety Glass Co., Ltd.* v. *Lancegaye Safety Glass (1934), Ltd.*, [1939] 2 K. B. 395 ; 108 L. J. K. B. 763, C. A.

(*m*) *R.* v. *I. C. R. Haulage, Ltd.*, [1944] W. N. 135, C. C. A.

(*n*) 52 & 53 Vict. c. 63.

(*o*) See also Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86), s. 33, in which special provision is made as to procedure where a corporation is charged with an indictable offence or an offence in respect of which the accused may claim trial by jury. It may be noted that the Companies Act, 1948 (11 & 12 Geo. 6, c. 38), expressly imposes many penalties directly upon the company : see ss. 5, 7, 19, 24, 25, 30, 41, 48, 53, 54, 57, 58, 62, 63, 78, 80, 87, 96, 97, 107, 108, 110, 111, 119, 120, 124-127, 131, 143, 155, 156, 158, 200, 206, 208, 279, 293, 335, 338, 370, 414 and 433.

Where a statute prohibits an act, under a penalty, a corporation which by its agent (acting within the scope of his authority) does the act is liable to be convicted of the offence. Thus, a corporation may, by its servant, be guilty of selling liquor (*p*), or food (*q*), or of employing persons in a factory (*r*), or of keeping open a shop (*s*), or of allowing smoke to escape (*t*), contrary to the appropriate statutory provision (*u*).

Moreover, a corporation (which can only act by its agents) is liable to be convicted of an offence, although intention or knowledge constitute an essential element in the offence, if the intention or knowledge be in its agent acting within the scope of his authority. Thus, a corporation may be convicted of making use of a document with intent to deceive (where the intent is that of its servant) ; of making a statement which it knows to be false (where the knowledge of falsity is in its servant), contrary to regulations having the force of a statute (*a*) ; of giving a false account of goods conveyed by rail with intent to avoid payment of dues (where the intent is that of its servant (*b*) ; of giving a false warranty in writing as to a food or drug (*c*) ; or where agents acting within the scope of their authority make fraudulent returns even though the frauds were intended to benefit the agents and not the company (*d*). The theoretical difficulty of imputing criminal intention to a corporation is not felt to the same extent as in former times (*e*).

Furthermore, the element of *mens rea*, which is essential to the offence of conspiracy, may be imputed to a corporation, acting by its servant (*f*).

*Illustrations*

1. The master of a British ship overloaded her without the assent or knowledge of the owner. Held, that the owner was not liable to the penalty imposed by the Merchant Shipping Act, 1876 (*g*) upon "any owner or master . . . who allows" overloading.

2. Gaming is carried on upon licensed premises to the knowledge of the servant left in charge of the premises, but without the knowledge or connivance of the licensee. The licensee has suffered gaming to be carried on upon the premises, within the meaning of the Licensing (Consolidation) Act, 1910,

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(*p*) *Hotel Regina (Torquay), Ltd.* v. *Moon*, [1940] 2 K. B. 69 ; 109 L. J. K. B. 582.

(*q*) *Pearks, Gunston and Tee, Ltd.* v. *Ward*, [1902] 1 K. B. 1 ; 71 L. J. K. B. 656 (not of the nature, substance and quality demanded) ; and see *R.* v. *Ascanio Puck & Co., Ltd.* (1912), 76 J. P. 487 (sale of unsound meat).

(*r*) *R.* v. *Gainsford JJ.* (1913), 29 T. L. R. 359.

(*s*) *Evans & Co., Ltd.* v. *London County Council*, [1914] 3 K. B. 315 ; 83 L. J. K. B. 1264.

(*t*) *Armitage, Ltd.* v. *Nicholson* (1913), 108 L. T. 993.

(*u*) A corporation, however, cannot be convicted as a rogue and vagabond, nor incur a pecuniary penalty under sect. 41 of the Lotteries Act, 1823 (4 Geo. 4, c. 60), for selling tickets in a lottery (*Hawke* v. *Hulton & Co., Ltd.*, [1909] 2 K. B. 93 ; 78. L. J. K. B. 633).

(*a*) *Director of Public Prosecutions* v. *Kent and Sussex Contractors, Ltd.*, [1944] 1 K. B. 146 ; 113 L. J. K. B. 88 (Defence Regulations).

(*b*) *Mousell Brothers, Ltd.* v. *London and North Eastern Ry.*, [1917] 2 K. B. 836 ; 87 L. J. K. B. 82.

(*c*) *Chuter* v. *Freeth & Pocock Ltd.*, [1911] 2 K. B. 832.

(*d*) *Moore* v. *Bresler Ltd.*, [1944] 2 All E. R. 515.

(*e*) *Director of Public Prosecutions* v. *Kent, etc., Ltd., supra, per* Hallett, J., at p. 157.

(*f*) *R.* v. *I. C. R. Haulage, Ltd.*, note (*m*), *supra*.

(*g*) 39 & 40 Vict. c. 80, s. 28 ; *Massey* v. *Morriss*, [1894] 2 Q. B 412 ; 63 L. J. M. C. 185. See now the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 442.

s. 79 (*h*). Similarly, the proprietor of a restaurant was held responsible for the acts of his manager in harbouring prostitutes, contrary to the Metropolitan Police Act, 1839, s. 44 (*i*) which makes liable to conviction " every person who shall have or keep a house . . . and who shall knowingly permit or suffer prostitutes to meet together and remain there ". But the knowledge of a servant is not sufficient, unless he is in charge of the premises or of the part where gaming is carried on (*k*).

3. A licensee is not liable under the Licensing (Consolidation) Act, 1910, s. 68 (*l*), for the act of a servant who knowingly sells intoxicating liquor in a bottle which is not corked and sealed to a child under the age of fourteen years, without the knowledge or connivance of the licensee, or of the person in charge of the licensed premises (*m*) ; nor is he liable under the Licensing Act, 1921, s. 4 (*n*), for the act of a servant who without such knowledge or connivance sells liquor after permitted hours, where the servant has no authority to sell any liquor (*o*). But if a servant knowingly supply liquor to a constable on duty, the licensee, although he had no knowledge of the servant's act, is liable to be convicted under the Licensing (Consolidation) Act, 1910, s. 78 (*p*). So, where the servant supplies a drunken person (*q*).

4. A, who was licensed to sell beer by retail at the premises of a brewery company, for consumption off the premises, gave instructions to the draymen, who delivered beer to customers who had given orders for it at the company's office, not to deliver to any persons who had not given such previous orders, and took reasonable care to prevent any infringement of such instructions. The beer was sold for cash on delivery, and no appropriation was made of bottles or crates to any particular customers. One of the draymen sold beer for cash in the street to persons who had not sent previous orders. It was held that such sales were outside the scope of the drayman's employment, and that A was not liable to be convicted under section 3 of the Licensing Act, 1872 (*r*), which makes it an offence for " any person " to sell intoxicating liquor at an unlicensed place (*s*).

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(*h*) 10 Edw. 7 & 1 Geo. 5, c. 24 ; *Redgate* v. *Haynes* (1876), 1 Q. B. D. 89 ; 45 L. J. M. C. 65 ; *Bond* v. *Evans* (1888), 21 Q. B. D. 249 ; 57 L. J. M. C. 105.

(*i*) 2 & 3 Vict. c. 47 ; *Allen* v. *Whitehead*, [1930] 1 K. B. 211 ; 99 L. J. K. B. 146.

(*k*) *Somerset* v. *Hart* (1884), 12 Q. B. D. 360 ; 53 L. J. M. C. 77.

(*l*) 10 Edw. 7 & 1 Geo. 5, c. 24. The section enacts that the licensee " shall not knowingly sell or deliver or allow any person to sell or deliver " in the manner prohibited.

(*m*) *Emary* v. *Nolloth*, [1903] 2 K. B. 264 ; 72 L. J. K. B. 620 ; *Conlon* v. *Muldowney*, [1904] 2 Ir. R. 498 ; *McKenna* v. *Harding* (1905), 69 J. P. 354 ; *Allchorn* v. *Hopkins* (1905), 69 J. P. 355 ; *Groom* v. *Grimes* (1903), 89 L. T. 129.

(*n*) 11 & 12 Geo. 5, c. 42. The prohibition is that " no person shall . . . by himself or by any servant or agent, sell," etc.

(*o*) *Adams* v. *Camfoni*, [1929] 1 K. B. 95 ; 98 L. J. K. B. 40 ; see also *Whittaker* v. *Forshaw*, [1919] 2 K. B. 419 ; 88 L. J. K. B. 989 (sale of milk to inspector without authority) ; *Star Cinema* v. *Baker* (1921), 126 L. T. 506 (sale of ticket by unauthorised attendant) ; *Wilson* v. *Murphy* (1937), 81 S. J. 139 (unauthorised collection of money for football pool).

(*p*) *Mullins* v. *Collins* (1874), L. R. 9 Q. B. 292 ; 43 L. J. M. C. 67. The offence is for a licensee to " supply any liquor . . . to any constable on duty," etc.

(*q*) *Police* (*Commissioner*) v. *Cartman*, [1896] 1 Q. B. 355 ; 65 L. J. M. C. 113.

(*r*) 35 & 36 Vict. c. 94. See now Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 65 ; Licensing Act, 1921 (11 & 12 Geo. 5, c. 42), s. 7.

(*s*) *Boyle* v. *Smith*, [1906] 1 K. B. 432 ; 75 L. J. K. B. 282. Comp. *Stansfeld* v. *Andrews* (1909), 100 L. T. 529, where the licensee was convicted of aiding and abetting his servant in the illegal sale.

5. A servant in charge of a vehicle containing coal misrepresents to an inspector appointed under the Weights and Measures Act, 1889 (*t*), the quantity of coal contained in the sacks. The employer is not liable to the penalty imposed by section 29 of that Act for such misrepresentation (*u*) upon " the person selling or keeping or exposing for sale coal (below the weight represented) or the person in charge of the vehicle ".

6. A servant of a milk salesman, in the course of his employment, sells adulterated milk. The master is liable to be convicted as a seller of adulterated milk under the Food and Drugs (Adulteration) Act, 1928, s. 2 (*a*), where the words used are " no person shall sell . . . " whether he authorised or connived at the adulteration or not (*b*). So, where a servant, by mistake, sold a mixture of butter and margarine as butter (*c*). But the master is not so liable, where the servant has no authority to make any sale (*d*). A master or principal is liable under the Merchandise Marks Act, 1887 (*e*), for offences within section 2 of the Act committed by his servants or agents in the course of their employment (*f*). The words used in this section are "Any person who forges . . . etc."

7. A manufacturer was summoned under the Smoke Nuisance (Metropolis) Act, 1853, ss. 1 and 2 (*g*), for negligently using a furnace so that the smoke was not consumed. The furnace was constructed so as to consume the smoke, if properly used, but the stoker employed to attend to it had been careless. Held, that the defendant was not criminally liable for the negligence of the stoker, and could not be convicted (*h*). Otherwise, if he had been summoned under the Public Health Act, 1875, s. 96 (*i*), by which section it is an offence to permit the recurrence of a nuisance after an order by a Court of summary jurisdiction ordering compliance with a notice of abatement.

8. An owner of works carried on for his profit by his agent is liable to be convicted in respect of a public nuisance proceeding from the premises, though the nuisance is caused by acts of the workmen, done without his knowledge and contrary to his general orders (*k*). An indictment for a public nuisance is a *quasi*-civil proceeding intended to prevent a recurrence thereof (*k*).

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(*t*) 52 & 53 Vict. c. 21.

(*u*) *Roberts* v. *Woodward* (1890), 25 Q. B. D. 412 ; 59 L. J. M. C. 129. And see *Anglo-American Oil Co.* v. *Manning*, [1908] 1 K. B. 536 ; 77 L. J. K. B. 205, where it was held that the possession by a servant of a false measure for his own fraudulent purposes was not, in the circumstances, the possession of his master.

(*a*) 18 & 19 Geo. 5, c. 31.

(*b*) *Brown* v. *Foot* (1892), 66 L. T. 649. And see *Collman* v. *Mills*, [1897] 1 Q. B. 396 ; 66 L. J. Q. B. 170 (slaughter of sheep in contravention of a bye-law).

(*c*) *Houghton* v. *Mundy* (1910), 103 L. T. 60.

(*d*) *Whittaker* v. *Forshaw*, [1919] 2 K. B. 419 ; 88 L. J. K. B. 989.

(*e*) 50 & 51 Vict. c. 28.

(*f*) *Coppen* v. *Moore*, [1898] 2 Q. B. 306 ; 67 L. J. Q. B. 689. See also *Mousell* v. *L. & N. W. Ry.*, [1917] 2 K. B. 837 ; 87 L. J. K. B. 82 (offences under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 98 and 99, of giving false accounts with intent to avoid payment of tolls) ; *Warrington* v. *Windhill, etc., Socy.* (1918), 118 L. T. 505 (sale of food, contrary to a Food Order).

(*g*) 16 & 17 Vict. c. 128 (repealed). See now the Public Health (London) Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 50), s. 147.

(*h*) *Chisholm* v. *Doulton* (1889), 22 Q. B. D. 736 ; 58 L. J. M. C. 133. Comp. *Armitage* v. *Nicholson* (1913), 108 L. T. 993 (offence under local Act).

(*i*) 38 & 39 Vict. c. 55 (repealed). *Niven* v. *Greaves* (1890), 54 J. P. 548. See now Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 49), s. 94.

(*k*) *R.* v. *Stephens* (1865), L. R. 1 Q. B. 702 ; *Barnes* v. *Akroyd* (1872), L. R. 7 Q. B. 474 ; 41 L. J. M. C. 110.

9. A trader harbours and conceals smuggled goods. He is liable to penalties for an illegal act done by his servant, in the conduct of the business, to protect the smuggled goods, though the act was done in his absence and on the exigency of the occasion (*l*).

10. In *Barker* v. *Levinson* (*m*) Lord Goddard C.J., stated the principle as to a master's responsibility for the crimes of his servant as follows :— " The master is responsible for a criminal act of his servant if the act is done within the general scope of the servant's employment." This slightly extends the principle as stated above. In that case a rent collector was authorised to let a particular flat if he were satisfied that a particular person would make a satisfactory tenant. The rent collector demanded an illegal premium. The act was held to be outside the scope of the agent's employment and the principal was not liable.

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(*l*) *Att.-Gen.* v. *Siddon* (1830), 1 C. & J. 220 ; 35 R. R. 701. See also *Att.-Gen.* v. *Riddle* (1832), 2 C. & J. 493.

(*m*) [1950] W. N. 448 ; 66 T. L. R. (Pt, 2) 627.

# APPENDIX

PAGE

**108 Article 57.**

*Liability of Solicitors for Negligence.*

Damages for substantial inconvenience and discomfort were given where a breach of contract between a solicitor and his client was caused by the negligence of the solicitor's managing clerk : *Bailey* v. *Bullock*, [1950] W. N. 482; 66 T. L. R. (Pt. 2) 791.

**111 Article 58.**

*Measure of Damages for Negligence.*

See also *Bailey* v. *Bullock*, [1950] W. N. 482; 66 T. L. R. (Pt. 2) 791, where damages for substantial inconvenience and discomfort were given on breach of a contract between solicitor and client.

**190 Article 88.**

*Ordinary Course of Business.*

The sale of a car without its registration book is not a sale in the ordinary course of business : *Pearson* v. *Rose & Young*, [1951] 1 K. B. 275.

**217 Article 102.**

*Misrepresentation by Principal or Agent.*

In *Candler* v. *Crane, Christmas & Co.*, [1951] 1 T. L. R. 371, the servant of a firm of accountants acting within the course of his employment negligently prepared a company's accounts knowing that they were wanted for the purpose of inducing the plaintiff to invest money in the company. The accountants were held not liable to the plaintiff (1) because although they owed a duty of care to shareholders, he was not a shareholder, and (2) because the principle in *Donoghue* v. *Stevenson*, [1932] A. C. 562, has never been applied to negligent misstatements.

**228 Article 106.**

*Trade Unions.*

By section 9 of the Trade Unions Act, 1871 (34 & 35 Vict. c. 31), the trustees of a registered trade union cannot be sued in tort other than torts touching or concerning property but the union can be sued in its registered name. The language of section 94 (1) of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), is identical so that the same principle applies to friendly societies : *Longdon-Griffiths* v. *Smith*, [1950] 2 All E. R. 662.

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